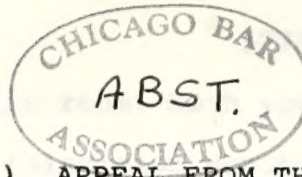


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No. 57784

PEOPLE OF THE STATE OF ILLINOIS,)	APPEAL FROM THE
)	CIRCUIT COURT OF
Plaintiff-Appellee,)	COOK COUNTY
)	
vs.)	
)	
RICHARD J. SETMEYER,	)	HONORABLE
	)	JAMES N. SULLIVAN
Defendant-Appellant.	)	PRESIDING

PER CURIAM¹ (First District, Fifth Division):

OFFENSE CHARGED

Contributing to the sexual delinquency of Embryn O'Neal, a child, 11 years of age. Ill. Rev. Stat. 1971, ch. 38, par. 11-5(a)(4)².

JUDGMENT

After a bench trial, defendant was found guilty and sentenced to a term of nine months at the Illinois State Farm.

CONTENTIONS RAISED ON APPEAL

1. That he was denied due process of law in that his identification was the result of a police arranged, unduly suggestive pre-trial confrontation.
2. That he was not proven guilty beyond a reasonable doubt.
3. That the alibi evidence should not have been disregarded by the trial court.

EVIDENCE

At the hearing on defendant's motion to suppress evidence, the following persons testified.

Richard Dennis, witness for defendant; Glenwood Police Officer:

On March 17, 1972, he was investigating a complaint that a man that day had tried to pick up a 10 year old girl named Cindy Peers. At approximately 7:00 P.M., he brought defendant to Cindy's house, but she could not make a positive identification. Later that same evening, he questioned defendant at the police station regarding another incident on March 14, 1972, involving a man who exposed himself to another young girl, Embryn O'Neal.

^{1/} Lorenz, J., took no part.

^{2/} (a) Any person of the age of 14 years and upwards who performs or submits to any of the following acts with any person under the age of 18 contributes to the sexual delinquency of a child:

* * *

(4) Any lewd act done in the presence of the child with the intent to arouse or to satisfy the sexual desires of either the person or the child or both.



No. 5784

PEOPLE OF THE STATE OF ILLINOIS,
Plaintiff-Appellee,

vs.

RICHARD J. SCHWARTZ,

Defendant-Appellant.

PER ORDEM: (First Division, Fifth Division)

OPTIONAL: (Second)

OPTIONAL: (Third)

JUDICIAL

OPTIONAL: (Fourth)

OPTIONAL: (Fifth)

OPTIONAL: (Sixth)

OPTIONAL: (Seventh)

OPTIONAL: (Eighth)

OPTIONAL: (Ninth)

OPTIONAL: (Tenth)

OPTIONAL: (Eleventh)

OPTIONAL: (Twelfth)

OPTIONAL: (Thirteenth)

OPTIONAL: (Fourteenth)

OPTIONAL: (Fifteenth)

OPTIONAL: (Sixteenth)

OPTIONAL: (Seventeenth)

OPTIONAL: (Eighteenth)

OPTIONAL: (Nineteenth)

OPTIONAL: (Twentieth)

OPTIONAL: (Twenty-first)

OPTIONAL: (Twenty-second)

OPTIONAL: (Twenty-third)

OPTIONAL: (Twenty-fourth)

OPTIONAL: (Twenty-fifth)

OPTIONAL: (Twenty-sixth)

OPTIONAL: (Twenty-seventh)

OPTIONAL: (Twenty-eighth)

OPTIONAL: (Twenty-ninth)

OPTIONAL: (Thirtieth)

OPTIONAL: (Thirty-first)

OPTIONAL: (Thirty-second)

OPTIONAL: (Thirty-third)

OPTIONAL: (Thirty-fourth)

OPTIONAL: (Thirty-fifth)

OPTIONAL: (Thirty-sixth)

OPTIONAL: (Thirty-seventh)

OPTIONAL: (Thirty-eighth)

OPTIONAL: (Thirty-ninth)

OPTIONAL: (Fortieth)

OPTIONAL: (Forty-first)

OPTIONAL: (Forty-second)

OPTIONAL: (Forty-third)

OPTIONAL: (Forty-fourth)

While defendant was in an interrogation room, both young girls viewed him on a small closed circuit television monitor.

Margaret Setmeyer, witness for defendant; his mother:

She accompanied her son and his wife to the police station on March 17, 1972, where Officer Dennis told her that the incident on March 14, 1972 occurred a few minutes before 6:00 P.M. and she replied that her son was not involved because he was home at 5:30 P.M. on that day.

Richard Setmeyer, defendant:

On March 17, 1972, he was stopped by the Thornton Police around 6:05 P.M. and was taken to Cindy's house, but she could not identify him. Later that evening, he went with his mother and his wife to the Glenwood Police Station and while sitting in an interrogation room two girls came to that room and viewed him. Ten minutes later the same two girls were brought back into the interrogation room and he was asked to say something. Following which he was placed under arrest.

After hearing the above testimony, the court denied the motion to suppress the evidence. A motion was then made to suppress the identification of defendant and the following persons testified.

Ralph Raul, witness for defendant; Police Chief of Glenwood:

He was at the police station when the two young girls viewed defendant on the five inch, black and white, closed circuit television monitor. During that viewing, he asked each girl separately if they had ever seen defendant before and they both said they were not sure. He then took each girl separately to view defendant, and Embryn O'Neal made a positive identification from approximately eight feet away. Cindy Peers also identified him as her offender. Defendant was the only person viewed by the girls. After this viewing, he asked the girls if there was anything else that would be helpful in identifying their offenders.

while defendant was in an investigation room, both young girls viewed him on a small closed circuit television monitor.

Margaret Sawyer, witness for defendant, also testified:

The defendant was seen and his wife by the police

station on March 12, 1972. When Officer Dennis said that

the incident occurred on March 12, 1972, I was in the

Grand Jury room and saw the defendant and his wife

he was seen at the time of the incident.

Richard Sawyer, witness for defendant,

testified that he was in the Grand Jury room

when the defendant and his wife were seen.

Small and other witnesses also testified

that they saw the defendant and his wife

on March 12, 1972, at the time of the incident.

The defendant and his wife were seen

by the Grand Jury and other witnesses

on March 12, 1972, at the time of the incident.

The defendant and his wife were seen

by the Grand Jury and other witnesses

on March 12, 1972, at the time of the incident.

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on March 12, 1972, at the time of the incident.

The O'Neal girl stated that she remembered a whispering type voice and he then took each girl individually to defendant for voice identifications. The O'Neal girl identified defendant's voice at this time.

The court denied the motion to suppress the identification and it was stipulated that the testimony adduced on the motions stand for trial. At trial the following persons also testified.

Lois O'Neal, witness for the State:

She gave permission to her daughter, Embryn, to go to the store and she noted that Embryn left for the store at 5:05 P.M. While awaiting her daughter's return, she received a phone call from Embryn, who was crying, and she told her that a man had asked directions to Holly Court and had bothered her. She phoned the police and after picking up Embryn, decided to drive by Holly Court in the hope that Embryn would recognize the man or the car. As she was driving, Embryn said, "Mama, I think that's the car." She followed the car to an apartment house and Embryn, who was now hysterical, said the driver was the same man. She called the police and she and her daughter went with them to the apartment building. When confronted with that suspect (not defendant), Embryn said it was not the man who had bothered her.

Ralph Raul, witness for the State; Chief of Glenwood Police:

On the evening of March 17, 1972, he went with Embryn and her parents to see if Embryn could identify the car used in the March 14, 1972 incident from about 15 cars in front of the police station. Embryn had previously described a light blue car with a silver stripe on the passenger's side. The area in front of the station was well illuminated by three Mercury vapor lights, and Embryn picked out, from about ten feet away, a light blue Plymouth that had a chrome strip along the front fender and whose chrome was scraped off from the passenger door to the back.



Richard Dennis, witness for the State; Glenwood Police Officer:

During his investigation of the March 14, 1972, incident Embryn described her offender's car as follows: late model, light blue, with damage to the right rear in that the chrome strip was missing. On the night of March 17, 1972, he observed a car of this description, driven by the defendant, in Glenwood, Illinois, where earlier that day there had been a complaint that a man tried to pick up a young girl.

Embryn O'Neal, witness for the State; being first qualified by the court as a competent witness:

On March 14, 1972, at approximately 5:00 P.M. she was on her way to the store when a man in a blue car asked directions to Holly Court. Speaking through the open window on the passenger's side she gave him directions which necessitated his turning his car around at the end of the street. On his way back, he asked her again, this time saying, "Could you show me?" Since she did not want to get into his car, she started running alongside. The following colloquy ensued on direct examination:

State: What else did he ask you?

Embryn: He asked me if I knew what a cock was and I said no and he showed it to me and he said 'Do you know what you do with it?' and I said no. He said 'You put it between a girl's legs.'

She was scared and ran into a grocery store, called home, and waited for her mother to pick her up. While driving with her mother, she saw a blue car and they followed it to an apartment. When they arrived home, her mother called and gave the license number to the police and told them that the man wore dark pants and a dark jacket, had no hat, glasses or moustache, but had a scratchy, funny voice. On the evening of March 17, 1972, she went to the police station and was asked to view defendant on a television and she could not make a positive identification. Later, while she was with Chief Raul, she was asked to view a

man who was with Officer Dennis in a room and she identified that man, the defendant, as the same one who asked directions and bothered her on March 14, 1972. A few minutes later, upon hearing defendant speak, she identified his voice as that of her offender. Then she went outside the police station and identified the car involved in the incident of March 14, 1972.

On cross-examination, she testified that the whole incident took about fifteen or twenty minutes. She also stated that she couldn't recognize defendant on the television because at that time his hair was combed neatly.

Margaret Setmeyer, witness for defendant; his mother:

On March 14, 1972, her husband picked her up after work and they went to her son's house in order to drop off Easter presents for their grandchildren. She remembers that they arrived at 5:25 P.M., and that her son came home five minutes later, carrying groceries. She also testified that her daughter-in-law was wearing gold shorts and that her son was suffering from an abscessed throat.

Kathleen Setmeyer, witness for defendant; his wife:

Her husband's parents came over at 5:25 P.M. on March 14, 1972, bringing Easter coats for her children. A few minutes later, her husband arrived with the groceries that she had asked him to bring home. She also stated that she was wearing black slacks, not shorts, and that her husband had laryngitis.

On cross-examination she testified that when her husband stops for groceries he usually arrives home at 5:30 P.M.

Richard Setmeyer, defendant:

On March 14, 1972 he left work at 4:15 P.M. His wife called earlier in the day asking him to buy milk, bread, and cigarettes on the way home. He got home at 5:30 P.M., approximately five minutes after his parents had arrived. He also stated that he had not been in Glenwood on that day and that he

was suffering from a severe throat infection. On March 17, 1972 traffic was heavy so he drove home through Thornton, Illinois, and on the way he was stopped by the Thornton Police and taken to a young girl's house. He was then driving a 1969 four-door, blue-gray or pearl-gray, Plymouth sedan that was missing almost all of its chrome on the passenger side.

OPINION

Initially, defendant contends that the in-court identification by the complainant was inadmissible because it was tainted by highly suggestive pre-trial identifications. Specifically, he claims that the procedures employed at the Glenwood Police Station, resulting in the television viewing, the personal viewing, and the positive voice identification was so conducive to irreparable mistaken identification as to deprive him of due process of law. We do not agree. Illinois courts have often held that identification testimony, even if tainted by a prejudicial pre-trial identification, is still admissible where an independent origin for the in-court testimony is established. People v. Terrell, 6 Ill.App.3d 941, 287 N.E.2d 74; People v. Taylor, 52 Ill.2d 293, 287 N.E.2d 673. During the commission of the crime Embryn viewed defendant from close proximity for fifteen to twenty minutes under good lighting conditions. She also told the police that the voice of her offender had a whispering sound. We believe that she had a more than ample and uninfluenced opportunity to view her offender during the incident, which firmly established an independent origin for her in-court identification testimony.

Defendant next contends that he was not proven guilty beyond a reasonable doubt, because his identification by the complainant was not clear and convincing nor was it corroborated. It is well established that the uncorroborated identification of a defendant by a single witness, including the complaining witness,

is sufficient to convict if the testimony is positive and the witness credible, although contradicted by the accused. People v. McVet, 7 Ill.App.3d 381, 287 N.E.2d 479. Defendant points out that the complainant mistakenly identified another man as the offender immediately after the incident occurred³ and that she could not make a positive identification of him on the closed circuit television monitor, therefore bringing in issue her credibility. In a bench trial it is the duty of the trial judge to determine the credibility of witnesses and the weight to be given to their testimony. Only where evidence is so unsatisfactory as to raise a reasonable doubt of the defendant's guilt will the finding of the trial judge be disturbed. People v. Catlett, 48 Ill.2d 56, 268 N.E.2d 378. In the instant case, Embryn O'Neal viewed defendant, from close proximity, for fifteen to twenty minutes during the commission of the crime. From this encounter she was able to make (1) a positive identification of defendant, (2) a positive identification of defendant's voice, and (3) a positive description of defendant's car. We have carefully examined the evidence in this case and conclude that the record before us is sufficient to establish defendant's guilt beyond a reasonable doubt. People v. Gaiter, 8 Ill.App.3d 784, 291 N.E.2d 172.

Finally, defendant contends that his alibi should not have been disregarded where the identification of him as the offender was unsatisfactory. Defendant, his wife, and his mother all testified that he arrived home at 5:30 P.M. on March 14, 1972, making it impossible for him to have committed the crime for which he was charged. However, there is no obligation on a trial court to believe alibi testimony over positive identification of an accused, even though the alibi may be established by a greater

3/ While with her mother she had tentatively identified him as he was leaving a car, however, shortly afterwards, upon closer examination, she said he was not the man.



number of witnesses. People v. Jackson, 54 Ill.2d 143, 295 N.E.2d 462. The trial court can best observe the demeanor of witnesses during the trial and here the trial court found that defendant was the perpetrator of the crime and this court will not disturb that finding.

JUDGMENT AFFIRMED

Publish abstract only.



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56910)

PEOPLE OF THE STATE OF ILLINOIS,)	
)	
Plaintiff-Appellee,)	APPEAL FROM THE CIRCUIT
	)	COURT OF COOK COUNTY.
vs.)	
)	
DAVID WILLIAMS,	)	HON. ROBERT J. COLLINS,
	)	Presiding.
Defendant-Appellant.)	

Mr. JUSTICE GOLDBERG delivered the opinion of the court:

David Williams (defendant) was indicted for armed robbery (Ill.Rev.Stat. 1969, ch.38, par.18-2) and for aggravated assault (Ill.Rev.Stat. 1969, ch.38, par.12-2(1).) He was found guilty of both offenses by a jury and was sentenced to 20 to 40 years for armed robbery and concurrently to one to five years for aggravated assault. He appeals.

The briefs in this case are a potent refutation of the often repeated assertion that appointed counsel for indigent defendants do not generally proceed with the same diligence and ability as do privately retained lawyers. An initial brief has been filed for defendant in which the points are raised that his constitutional rights were violated by arrest without probable cause; his guilt was not proved beyond a reasonable doubt; the aggravated assault arose from the same incident as the armed robbery and hence should be reversed and the sentence imposed is excessive. A supplemental brief was then filed for defendant setting forth commission of trial errors including violation of his constitutional right to remain silent; prejudicial final argument by the prosecutor and additional arguments regarding sufficiency of the evidence to prove guilt beyond a reasonable doubt. The State has responded by arguing that the arrest of the defendant was proper; guilt was proved beyond reasonable doubt; concurrent sentences for both offenses were proper and

the sentences were not excessive. The State has also filed a supplemental brief responding to the points raised in defendant's second brief. We also have a reply brief filed in behalf of defendant.

After a thorough examination of the entire record in this case, we have concluded that the argument regarding sufficiency of the evidence to prove guilt beyond a reasonable doubt has placed an issue before us which is dispositive of all remaining points in the case. We will therefore proceed with a review of all of the evidence.

The State's case against defendant consisted of the testimony of the complaining witness, James Woods, and that of three police officers. Woods was, however, the only witness who testified concerning the details of the alleged offense. He lived at 4325 South Parkway, in Chicago. On Saturday morning, July 11, 1970, he went to a currency exchange at 1322 East 47th Street to pay a bill. He drove there in his car, about one mile, and arrived about five minutes before 9:00 a. m. He had in his possession \$72 in currency, a Timex watch and a gold wedding band for which he had paid \$295.

Woods waited in front for the store to open. He saw defendant standing there. There were three or four other people standing out there also. Woods did not know defendant and that was the first time he had seen him. The defendant tried to speak to Woods but Woods replied that he did not wish to talk. Defendant then pulled out a gun. Woods described it as a black .32 caliber pistol with no handle. Defendant then took part of the money out of Woods' pocket. He then took Woods "down a few doors", up a stairway in the building and out to the back porch. He hit Woods "aside the head." All this time, defendant held the gun at Woods' head. The back porch was reached by walking through a hall inside the building. Here, he called for help but no one responded.

On the porch, defendant made Woods sit down and held the gun up against his head. He then took the rest of the money. Woods asked the defendant to let him go because he had all the money, his watch and ring. The defendant said that he would kill Woods because he was going to talk. Defendant then snapped the gun, shot it twice, and Woods heard the shots but was not hurt. Defendant then put the gun at his side and snapped it again but it would not shoot. Woods also testified that three shots all told were fired by defendant and they made a loud noise. Woods then "broke and ran" west on 47th Street. He saw a lot of people standing on the street. Police officers then stopped him. He testified that he told the police officers that he had been robbed of money, a watch and a ring by "a man." One officer said, "I've got him, come back and look at him." He then took Woods back to the building. There, Woods saw defendant in handcuffs, in the custody of the police at the rear of the building.

He testified that defendant was "in the alley, on the back porch, where they had him." He also said defendant was standing in the alley. He also testified that he saw defendant on the back porch for about half an hour. He also stated that defendant was near the porch or about eight feet from it. He got back his \$72 and saw the ring at the police station, but not the watch. The police searched defendant but could not find the watch. Woods testified that he was certain that when he first saw defendant upon returning to the building, defendant was standing at the back of the building and not sitting in the police car.

Woods also testified that the gun was in the same condition in court as it was when the crime was committed. At one point in the proceedings, one portion of the gun fell away from the rest of it. Woods testified that it was in several pieces;

just as when he first saw it. He was struck by defendant on the left side of the head in front of the ear but this caused no bruises or marks. He told the police when they caught him and took him back to where defendant was, that defendant had struck him. He stated that he had also testified before the grand jury that defendant struck him. However, he conceded that there was no such statement in the transcript of his grand jury testimony.

Police Officer O'Hara testified that he saw the complaining witness come running out of a gangway and then in a westerly direction on 47th Street. He pursued and stopped him about 100 yards from the building. He then took Woods back to the building itself. When he and Woods went to the back of the building, they saw two other police officers and the defendant in the alley. Defendant was in custody and one of the officers had possession of the gun. He did not hear any shots fired. There were spent shells in the gun. They were removed from the gun in his presence. He could not tell from these spent shells whether the gun had been fired. Woods never told him that defendant had struck him. Woods required no treatment. When they first saw defendant, he was in back of the building and not sitting in a police car.

Officer Hardesty testified that, on July 11, 1970, he and another police officer, who did not testify, drove up to the building in question at about 9:35 in the morning. The janitor of the building said that there was a man in the back alley with a gun. They found defendant about 25 feet from the rear building entrance, in the alley with a revolver in his hand. When they drew their guns, defendant dropped the revolver at their command. They made a preliminary search of defendant and found no other weapons. The gun was a .32 caliber revolver

without a handle in a very rusty condition. It contained four expended shells. He had never tried to fire the gun but had tried the mechanism and found that it worked. He could not tell if it had recently been fired. He had occasion to see the complaining witness in front of the building in question. When Woods saw defendant, defendant was seated in the back seat of the police squad car in front of the building. Officer O'Hara was also there. Woods pointed to defendant and said that he was the man who had robbed him.

Officer Hardesty was present when defendant was searched in the police station. Defendant had \$72 in currency, a man's gold wedding ring "made of gold metal" and four live .32 caliber shells. Woods told him that defendant had struck him with his fist. He could not recall if he put this information in the police report. Upon examining the report, however, he agreed that it did not indicate that Woods told him this. He did not hear any shots at any time. He observed no marks or bruises upon the complaining witness.

The State called another police officer who testified to being present when defendant was searched and corroborated the property found in defendant's possession.

The evidence in behalf of defendant consisted of his own testimony and that of three other witnesses. Defendant testified that he had seen Woods before. On the date in question, he and one of the other witnesses, Marvella Potts, walked to the building together. They met Woods at this point. Woods had some dice and suggested a game. When the defendant asked what kind of game, Woods stated, "Let's get a crap game going." They went into the vestibule of the front building and started gambling. Those present were Marvella Potts, the manager of

the building, and a janitor or janitor's helper named Oscar. Defendant testified that the manager did not play but was delivering mail to the tenants and merely stopped to speak to them. He testified that another person named Dickerson, or perhaps Nixon, who did not testify, was also present.

Defendant testified that the game continued until about 10:00 a. m. Marvella Potts left shortly before the game broke up. Defendant won approximately \$40 from Woods and also won the ring from him. He won about \$20 from the janitor's helper and other sums so that his winnings were a total of about \$70. Woods asked him to loan him some of the money back, but defendant refused. Woods then "got mad and left."

Defendant further testified that then he went to his apartment and took his old gun on the back porch to see if it would work. He stated that the gun was a "raggedy" old gun which falls apart and he did not know if it would work. He had obtained the gun, containing the four empty shells, from a man named Saterfield. He was going to take the empty cartridges out and put in live ones to see if it would fire. He was on the back porch talking to some people he knew from the building when the police came up, told him to drop the gun and arrested him. Defendant specifically denied that he had robbed Woods or struck him with his fist or with his gun. He had previously seen Woods a couple of times in the building. He described the manager as named Leslie Poe and the janitor's helper as being named Archie.

The manager of the apartment building, whose name is actually Leslie Pope, testified for defendant. He verified the fact that defendant lived in the building with his brother. He saw defendant on the date in question, about 9:40 or 9:50 a. m., in the vestibule of the building. He also saw with

defendant, Mr. Martin who later identified himself as Archer Martin, another tenant in the building who is the janitor's helper. Defendant and Martin were standing and there was money on the floor of the vestibule. Another man, whom he did not know and did not recognize, was with them, crouched down. Pope was then engaged in delivering mail to the tenants. He stayed on the premises all the time. He later saw the police arrive and saw defendant handcuffed. He did not see a gun at any time and he heard no shots or unusual noises of any kind. After delivering the mail, he returned to his office on the first floor. Since he had merely passed and generally observed the group, he did not know if they were gambling but he did see money on the floor.

Marvella Potts testified that, shortly after 9:00 o'clock, she was walking toward the building in question when she met defendant. She saw defendant stop and he and another man spoke. She identified the complaining witness then sitting in the courtroom as being the other man. They talked for awhile then went in and began a dice game. The janitor's helper, described by her as "Oscar", got into the game also. She did not participate in the game but only watched. She left when it was almost 10:00 a.m. There was money on the floor of the vestibule. During the course of the game, she also saw Leslie Pope, the manager, described by her as the "landlord", pass by. She observed that defendant was winning "most of the money." She saw no gun; and, during the entire time that she was there, she heard no shots.

The last witness for defendant was Archer Martin, sometimes mistakenly referred to as "Oscar." He was a janitor's helper in the building. About 9:00 or 9:30 in the morning, he was involved in a dice game in the vestibule. Those present were defendant, some person named Nixon and another man. He described the latter

as "fat" and agreed that his name was Woods. He did not see Woods in the courtroom when he testified. Those present played dice. The witness lost about \$20 and defendant won more than \$40 from Woods. Woods even put his ring up in the game. After he lost the money, the witness left and went about his work. During the entire time that he was there, and in the building that morning, he heard no shots. He testified that defendant was a tenant in the building and that he had seen him on various occasions. That was the only time that he had ever seen Woods.

Woods also testified on rebuttal. He stated that he never saw Leslie Pope or Marvella Potts before. He was in the building only about 30 minutes and only when compelled to do so by defendant. He had never played dice and never owned dice.

Considering first the testimony of the complaining witness, there are many circumstances which tend to create a strong doubt. It would be most unusual for an armed robber to hold his victim up at gunpoint on the sidewalk in broad daylight in the presence of other people, take only part of his money and lead him away upstairs to take the rest. He told the police that defendant struck him but he had no mark of trauma on his person. Also, this is contrary to the testimony of Officer O'Hara who first accosted him. His testimony in this regard is weakened by the grand jury transcript. He claims that defendant also took his watch which he described as a Timex. Yet the watch was never recovered from defendant's possession. The watch is not mentioned in the armed robbery indictment. Since defendant retained the money and the allegedly valuable ring, there was no explanation as to what disposition he could have made of the watch.

His testimony that defendant held a pistol to his head and fired two shots from the gun, which failed to hurt him, or

even to cause powder burns, is both amazing and unacceptable. His testimony is uncertain as to whether the gun was actually discharged two or three times. Several credible witnesses who were in the immediate vicinity heard no shots. Also, there is no explanation of his testimony that he was running away from the police officer rather than toward him and had to be pursued and stopped. As regards the gun, Woods first told Officer O'Hara simply that he had been "robbed." He told the officer that he did not want to go back to the scene of the alleged crime. He made no complaint of armed robbery and no statement concerning a gun until after he saw the defendant and learned that defendant had possession of a gun when taken into custody. His testimony regarding where he first saw defendant after the robbery is thoroughly confused and, in part, contradicted by other witnesses.

Analysis shows further that the only corroboration of any kind of the entire testimony of the complaining witness is defendant's possession of the ring and the currency. On the other hand, the explanation offered by defendant regarding his possession of the money and the ring is both reasonable and credible. Defendant's testimony offers a sound and logical explanation of how he obtained possession of the ring and the currency. Defendant's testimony that he took his gun after the dice game and went out to the back of the building to test it is supported by the fact that the police found him holding the gun in plain view at or near the rear of the building. Furthermore, the perpetrator of an armed robbery would usually attempt to conceal himself or leave the area.

Defendant's testimony that he participated in a dice game with the complaining witness is strongly substantiated by the testimony of Leslie Pope, the building manager, Marvella Potts, who actually saw the defendant winning money, and Archer Martin,



who also participated in the game and saw the complaining witness lose his ring to the defendant. It is true that these witnesses are all acquainted with defendant in varying degrees. However, they were all thoroughly and ably cross-examined and were not impeached or discredited in any substantial manner. On this entire record, defendant's explanation is strong within itself and strongly supported by other witnesses. By way of contrast, the testimony of the complaining witness is weak and even improbable in some respects and lacks corroboration.

It is true, as urged by the State, that positive testimony of one credible witness is sufficient to sustain a conviction. (People v. Clarke, 50 Ill.2d 104, 110, 277 N.E.2d 866; People v. Bergeron, 10 Ill.App.3d 762, 766, 295 N.E.2d 228.) As shown, the testimony of the complaining witness here lacks the attributes of being positive and credible particularly when contrasted by the strong evidence produced by defendant and by apparently impartial credible witnesses. It has been repeated many, many times by the decisions of our courts that a criminal conviction will not be reversed unless the evidence is so improbable as to raise a reasonable doubt of guilt. (People v. Zuniga, 53 Ill.2d 550, 559, 293 N.E.2d 595.) However, by the same token, where the evidence of guilt is doubtful and uncertain, and where the explanation offered by the defendant is positive, credible and unimpeached, it then becomes our clear duty to reverse the conviction. (People v. Gardner, 35 Ill.2d 564, 571, 221 N.E.2d 232.) This entire record leaves us with a grave and serious doubt of guilt. The judgment should be and it is reversed. See authorities cited by the dissent in People v. Stombaugh, 52 Ill.2d 130, 140, 284 N.E.2d 640; also People v. Mostafa, 5 Ill.App.3d 158, 179, 180, 274 N.E.2d 846 and cases therein cited.

JUDGMENT REVERSED.

BURKE, P.J., and EGAN, J., concur.



57623

PEOPLE OF THE STATE OF ILLINOIS,)	
	)	APPEAL FROM THE
Plaintiff-Appellee,	)	CIRCUIT COURT
	)	OF COOK COUNTY.
v.)	
	)	HONORABLE
DONALD P. WRIGHT,	)	KENNETH R. WENDT,
	)	PRESIDING.
Defendant-Appellant.)	

PER CURIAM * (First Division, First District):

Donald P. Wright, defendant, was charged by indictment with the crime of unlawful restraint in violation of section 10-3(a) of the Criminal Code. (Ill.Rev.Stat. 1969, ch. 38, par. 10-3(a).) On March 10, 1972, after a bench trial, he was found guilty and sentenced to one to two years. On appeal, defendant's only argument is that he was improperly denied a continuance.

At trial the parties initially stipulated that on August 7, 1971, between 9:45 a.m. and 10:30 a.m., he and Barbara Beavers were in his automobile, a 1965 Buick station wagon, white, beige and dark brown in color, bearing Illinois 1971 license 845-173.

Barbara Beavers testified that on August 7, 1971, between 9:30 a.m. and 9:45 a.m., she was walking down Douglas Boulevard when the defendant pulled up next to her in his automobile and said, "Say, slim". She continued to walk and approximately one block down defendant again pulled up next to her, got partially out of his car, produced a revolver and told her to "get in". With the gun pointed at her, Miss Beavers entered defendant's automobile. Defendant asked her where she was going and she replied that she was going shopping. Defendant then asked if she smoked reefers, drank and went to parties. She replied that she did not drink or

* BURKE, P.J. not participating.

smoke reefers, but she did go to parties. She requested to be let out of the car, but defendant refused to stop. At one point she saw a squad car and attempted to open the car door, but the defendant grabbed her and told her not to do that anymore. Miss Beavers again attempted to open the door of the car and leave, but defendant stopped the car, grabbed her around the neck and began to choke and hit her. Miss Beavers managed to get out of the car and ran to a man she saw standing on the street. Mr. Metoyer came up to her and gave her the license number of defendant's automobile. The police were then summoned.

Hans Metoyer testified that on August 7, 1971, at approximately 10:30 a.m., he was working at 2655 West 19th Street, Chicago, Illinois. While on the second floor he heard screaming and looked out the window. He observed Miss Beavers trying to get out of an automobile while a man was choking and beating her. Miss Beavers managed to break away and run. He immediately copied down the license number of the car and went downstairs, where he talked to Miss Beavers. Miss Beavers was bleeding from the mouth when he approached her.

James Mack, a Chicago police investigator, testified that on August 20, 1971, the defendant voluntarily came into the police station and was placed under arrest.

Donald Wright, the defendant, testified that on August 7, 1971, at approximately 10:00 a.m., he saw Miss Beavers walking down Douglas Boulevard. Miss Beavers appeared to be in a daze and he almost hit her when she stepped off the curb. A short conversation ensued, during which Miss Beavers asked the defendant to take her to Zayre's. She voluntarily got into the car and they just drove around talking. Miss Beavers did not ask to leave the car. As he was proceeding down the street,

Miss Beavers opened the door and defendant grabbed her and came to a stop. She got out of the car hollering and said, "I got your license number". Defendant denied ever having a gun in his possession. He also denied hitting Miss Beavers and stated that he did not know how she got a bloody mouth.

Defendant's only argument on appeal is that he was improperly denied a continuance. On March 10, 1972, when the case was called, privately retained defense counsel requested a continuance because he was going to trial in another courtroom and the State had not furnished a list of witnesses until that morning. After some discussion, the case was passed to allow defense counsel to check his prior commitment and see if that case would go to trial. A short time later, defendant's counsel returned to the courtroom, the case was recalled and proceeded to trial without any further discussion of a continuance.

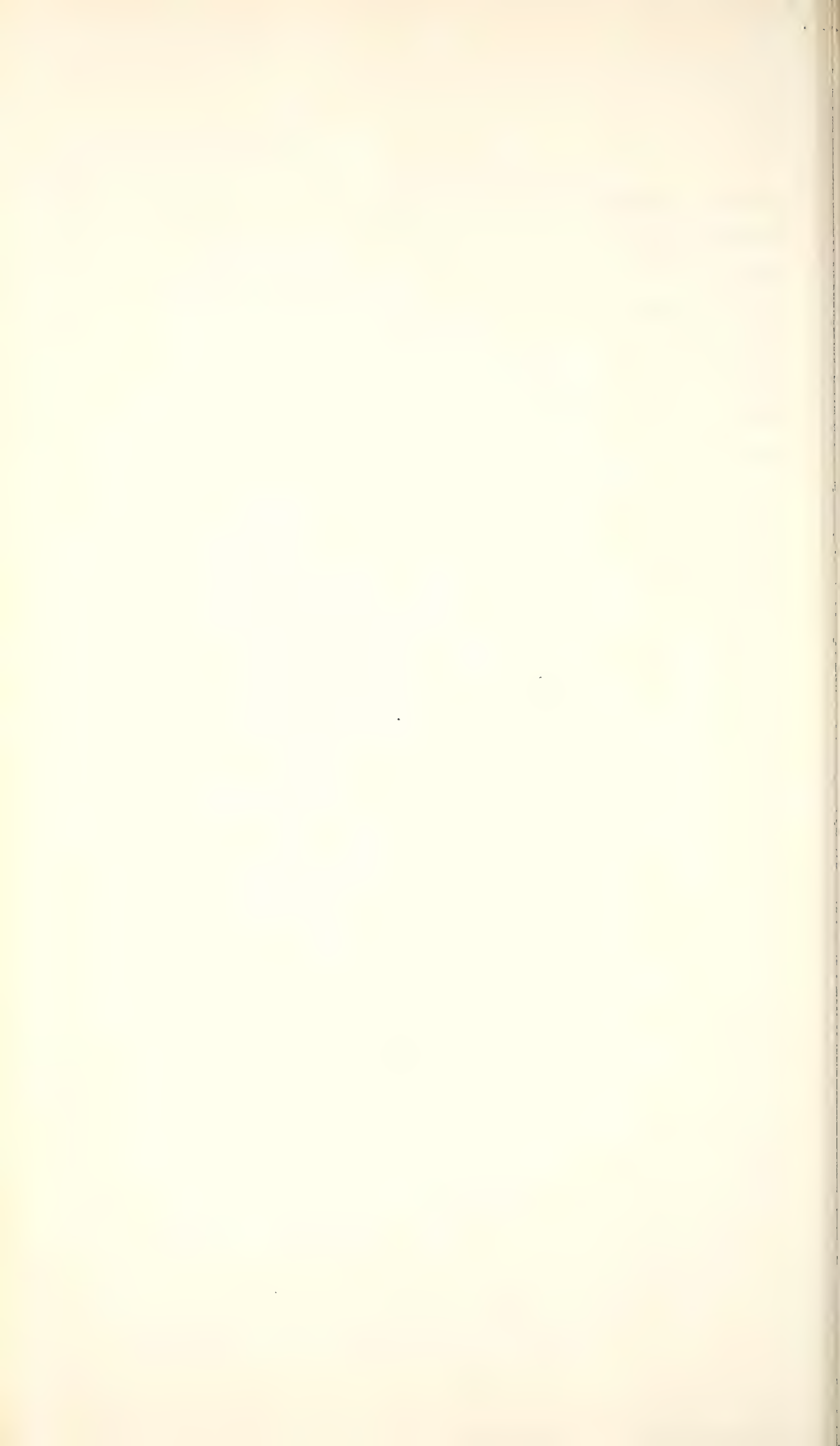
Motions for continuance are addressed to the discretion of the trial court. (People v. Clark, 9 Ill.2d 46, 137 N.E. 2d 54.) A reviewing court will not interfere with the trial court's denial of a defendant's motion for a continuance unless the trial court has abused its discretion. People v. Summers, ___ Ill.App.3d ___, ___ N.E.2d ___ (No. 55689, decided June 14, 1973).

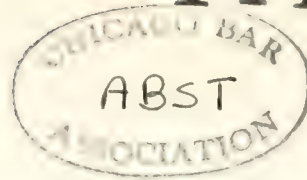
After a review of the record in the case at bar, we do not believe that the trial court abused its discretion in denying defendant's motion for a continuance. The crime had occurred August 7, 1971. Defendant was arrested August 20, 1971, and a preliminary hearing was held shortly thereafter, at which defendant was represented by his trial counsel's partner. Defendant was indicted December 3, 1971, and was arraigned on the indictment on January 24, 1972. Privately

retained defense counsel filed his appearance representing defendant on the date of the arraignment and thereafter secured three continuances on his motion. Defense counsel did not request a list of witnesses until March 2, 1972. The witnesses who testified at trial were the same witnesses who had testified against the defendant at the preliminary hearing and before the Grand Jury. After the discussion regarding a continuance, the case was passed and, the case proceeded to trial without further mention of a continuance. Privately retained defense counsel's conduct at trial demonstrated that he was obviously prepared and was not surprised by the testimony of any witness. Under those circumstances, the trial court did not abuse its discretion in denying the defendant's motion for a continuance.

For the foregoing reasons, the judgment of the circuit court of Cook County is affirmed.

JUDGMENT AFFIRMED.





NO. 55024

PEOPLE OF THE STATE OF ILLINOIS,	)	APPEAL FROM
	)	CIRCUIT COURT
Plaintiff-Appellee,	)	COOK COUNTY
)	
vs.)	
)	
CLIFF VASQUEZ, a/k/a CLIFF	)	HONORABLE
VASQUZE, Impleaded,	)	FRANCIS T. DELANEY,
	)	PRESIDING.
Defendant-Appellant.)	

PER CURIAM:

Cliff Vasquez, a/k/a Cliff Vasquze, hereinafter "defendant," was charged with another in a two count indictment with the offenses of armed robbery in violation of section 18-2 of the Criminal Code. (Ill. Rev. Stat. 1967, ch. 38, par. 18-2). He entered pleas of guilty to the offenses as charged in the indictment and was sentenced to concurrent terms of three years to three years and one day. A subsequent motion to vacate the pleas of guilty, filed during a stay of mittimus, was denied by the trial court, and defendant appealed.

Private counsel appointed to represent defendant on appeal filed, in September 1972, a brief pursuant to the case of Anders v. California, 386 U.S. 738, but inadvertently failed to file his motion for leave to withdraw as appellate counsel until April 1973, the motion being grounded on counsel's belief after a review of the record in this case that all points which could be raised on appeal were without merit and that the appeal was therefore frivolous. This court thereafter forwarded copies of the motion and brief to defendant's last known address in residential Chicago together with a notice that he would be allowed time until July 16, 1973 to file any points he wished in support of the appeal. The notice and the copies of the brief and motion were subsequently returned to the court, the envelope bearing the United States Post Office notation, "Moved, left no address."



Appellate counsel designates four points which could be raised on appeal but which he feels are without merit, rendering the appeal frivolous: 1) Whether the court abused its discretion in denying defendant's motion to vacate the pleas of guilty; 2) Whether the pleas of guilty were knowingly and voluntarily made; 3) Whether the indictment is legally sufficient; and 4) Whether the sentence imposed is excessive.

Two months prior to the entry of the pleas of guilty the defendant filed a motion for the appointment of counsel other than the public defender, who had theretofore been appointed as his counsel. The grounds stated in the motion were to the effect that the public defender was not representing defendant to the best of his ability, that the public defender had arrived at conclusions inconsistent with the "true facts" in the case, and that the public defender had acted improperly in defendant's behalf in prior proceedings. It does not appear from the record that the trial court acted upon that motion.

On February 16, 1970 a hearing was held on defendant's change of plea, judgment was entered on the pleas of guilty and sentence imposed, and defendant was granted a stay of mittimus until March 16, 1970. At the hearing defendant's co-indictee was fully admonished by the court as to his plea of guilty, and the defendant was thereafter admonished as follows:

"Q (by the court) Cliff Vasquez?

"A Yes.

"Q Mr. Vasquez, you have heard your attorney, the Public Defender, advise me at this time that you are withdrawing your not guilty plea to each of these counts in this indictment consisting of two counts and you are pleading guilty to both of these counts at this time, is that correct?

"A Yes.

"Q Do you understand that when you plead guilty

you automatically waive your right to a trial by me and anybody sitting in my place and stead, twelve people in the jury box, in other words you get no trial whatsoever?

"A Yes.

"Q And knowing and understanding that do you still persist in your guilty plea?

"A Yes.

"Q Before accepting your plea, Mr. Vasquez, it is my duty to advise you that under your pleas of guilty to the two counts in the indictment charging you with armed robbery I may sentence you on each one of them, not less than two years and for as long as the rest of your natural life and may make the two sentences run consecutive rather than concurrent, do you understand that?

"A Yes.

"Q Knowing and understanding the penalty to which you are subjected do you still persist in your guilty pleas to this indictment consisting of two counts of armed robbery?

"A Yes.

"THE COURT: Let the record show that Cliff Vasquez having been advised of the consequences of his pleas of guilty to this indictment and two counts charging him with armed robbery in each count and being so advised he still persists in his guilty pleas. The pleas, therefore, will be accepted and there will be a finding of guilty of armed robbery in the manner and form as charged in each count of the indictment and there will be a judgment on each finding."

On March 18, 1970 a supplemental hearing was held at which the State requested that the mittimus issue as to defendant. The court determined that thirty days had not expired since the rendition of the judgments of conviction, because of the twenty-eight day month of February. Defendant moved that the pleas of guilty theretofore entered be vacated, giving as grounds therefor that he was not adequately represented by counsel, that he had witnesses, and that the facts would show that he was not guilty. The motion was denied, the mittimus issued instantler, and defendant was allowed to file the necessary documents to perfect an appeal in this matter.



The trial court had jurisdiction to entertain defendant's motion made at the supplemental hearing to vacate the pleas of guilty. The mittimus had not theretofore issued and the court's ruling on that motion came on the thirtieth day after rendition of the judgments of conviction. (See e.g., People v. Lance, 25 Ill. 2d 455, 185 N.E. 2d 221; People v. Wakeland, 15 Ill. 2d 265, 154 N.E. 2d 245.) The defendant had no absolute right to withdraw his pleas of guilty, and in light of the conclusory reasons advanced by him to the court as to why he wished the pleas withdrawn, the court did not abuse its discretion in denying his motion to vacate the pleas of guilty. People v. Spicer, 47 Ill. 2d 114, 264 N.E. 2d 181.

As to the question of whether error exists in the apparent failure of the court to rule on defendant's motion for the appointment of counsel other than the public defender, such action also rests within the sound discretion of the court. People v. Washington, 70 Ill. App. 2d 452, 217 N.E. 2d 356. The reasons advanced by the defendant in support of the motion involve matters dehors the instant record, and are more properly suited to a proceeding under the Post-Conviction Hearing Act than to a ground on a direct appeal. (Ill. Rev. Stat. 1971, ch. 38, par. 122-1 et seq.) Furthermore, the defendant entered pleas of guilty to the indictment, thereby waiving all errors not jurisdictional. People v. Fisher, 21 Ill. 2d 142, 171 N.E. 2d 617.

The foregoing quotation from the admonition given to defendant by the trial judge at the hearing on the change of plea demonstrates that defendant knowingly, understandingly, and voluntarily entered his pleas of guilty. The pleas of guilty in the instant matter were entered prior to the effective date of Supreme Court Rule 402, relating to pleas of guilty, and were governed by section 115-2 of the Criminal

Code, which was fully complied with by the court in accepting the pleas of guilty. (Ill. Rev. Stat. 1967, ch. 38, par. 115-2; Ill. Rev. Stat. 1971, ch. 110A, par. 402.)

As to the question of the sufficiency of the indictment, the indictment was couched in the terms and language of the statute defining armed robbery and is therefore legally sufficient. People v. Flowers, 14 Ill. 2d 406, 152 N.E. 2d 838.

The final point raised by appellate counsel relates to the length of the concurrent sentences imposed upon the defendant. The record discloses that the pleas of guilty were negotiated pleas. The sentences imposed were within the limits set by the statute then in effect imposing the penalty for armed robbery (Ill. Rev. Stat. 1967, ch. 38, par. 18-2) which provided a minimum term of two years; the minimum term which must be imposed for armed robbery under the current Unified Code of Corrections, as a Class 1 felony, is four years (Ill. Rev. Stat. 1972 Supp., ch. 38, pars. 18-2, 1005-8-1). The concurrent sentences imposed upon defendant of three years to three years and one day are not excessive.

In accordance with our duty under the Anders decision we have independently reviewed the record in the instant matter and have found no additional points which could support an appeal in this case. We conclude that the appeal is frivolous and without merit.

The motion of appellate counsel for leave to withdraw as counsel on this appeal is accordingly allowed and the judgments of conviction of the circuit court of Cook County are affirmed.

Motion allowed.
Judgments affirmed.

(First District, Second Division)

J. Downing, did not participate.

Publish abstract only.





56758

PEOPLE OF THE STATE OF ILLINOIS,	)	APPEAL FROM THE
Plaintiff-Appellee,	)	CIRCUIT COURT OF
	)	COOK COUNTY
v.)	
	)	HONORABLE
FRANK CAMERON,	)	ROBERT A. MEIER, III,
Defendant-Appellant.	)	JUDGE PRESIDING.

MR. JUSTICE DOWNING delivered the opinion of the court:

Frank Cameron (hereinafter defendant), after a trial without a jury, was found guilty of the murder of his wife, Kaye Cameron, in violation of Section 9-1 of Illinois' Criminal Code (Ill.Rev.Stat. 1969, ch. 38, sec. 9-1), and sentenced to a term of not less than 14 nor more than 18 years.

The State's evidence showed that defendant, a Chicago police officer, and the deceased, both of whom had been drinking in neighborhood taverns, returned home in the early morning hours of October 11, 1969. The couple's two younger children, ages four and five, and defendant's 11-year-old stepson, Russell Williams, were in their beds when the couple arrived home. A summary of the salient portions of the trial testimony follows.

Russell Williams, called as a State witness, testified that he was awakened by a slamming door upon the couple's arrival. Through a half-opened bedroom door, he heard defendant and the deceased arguing in the living room, which was about ten feet away from the witness' bedroom. Defendant was "cussing at" the deceased, and the argument continued for approximately a half hour; the witness then heard "slapping," followed by groans of the deceased. Defendant was then heard to say, "I ought to get my gun and blow your stupid brains out," to which the deceased rejoined, "Go ahead, coward. See how big of a man you are."

Russell Williams then heard defendant walk out of the living room to defendant's bedroom, where defendant paced around for a few seconds before returning to the living room. The deceased called out the witness' nickname, "Skip," and then the witness heard one gunshot. Defendant then ran down a hall leading from the living room to the kitchen, saying, "Oh, my God." He dialed the telephone, waited a few seconds, and then said, "Get an ambulance. I shot my wife."

The State's evidence further showed that when the investigating police officers arrived at the scene immediately after the shooting, the defendant stated he had an argument with his wife and accidentally shot her. The deceased was lying on her back on the couch, with an unlit cigarette between the fore and middle finger, and, because she was still breathing, the police removed her to a nearby hospital. Observation of the deceased showed an entrance wound approximately one inch above her right ear and an exit wound in the middle of her left ear, indicating a downward trajectory of the bullet; powder burns were observed on the right side of the deceased's head, indicating that the gun was fired either within one foot of her head or while in contact with her head. A bullet hole was found in the face of a lamp which stood on a table next to the couch; the entry and exit holes in the lamp indicated a downward trajectory of the bullet through the lamp.

Defendant's evidence attempted to show, variously, that the shooting was in self-defense or was an accident. Defendant testified that after he and Kaye Cameron arrived home, they began quarreling in the living room over a number of things, among them, why the deceased had not been home earlier in the evening to feed the children. A "name calling" session ensued. Both defendant and the deceased were seated on the living room couch, a few feet from a mantle whereon, defendant testified,

he had earlier placed the gun he customarily carried with him in his off-duty hours. In the midst of the quarrel, Kaye Cameron got up and turned toward the mantle. Because she had an unlit cigarette in her left hand, defendant thought she was looking for a match. When the deceased turned around to face defendant, she had the gun in her right hand. Defendant got up, and as he was moving toward the deceased, he tripped on one of three couch supports and fell on top of the deceased. He had a hold of her elbow in grabbing for the gun, and then he hit the gun; the weapon fired once and the shot caused the wounds in Kaye Cameron's head which resulted in her death. He further testified that after calling the police, he "gave her mouth-to-mouth" [resuscitation] and when she started breathing, he called a fire ambulance; he then put a towel under her head and stretched her out on the couch.

Defendant contends, first, that the State failed to prove him guilty beyond a reasonable doubt, arguing that the trial court erred in failing to believe his version of the incident, but, instead, gave credence to the State's witnesses and evidence.

As this State's Supreme Court said in People v. Arndt (1972), 50 Ill.2d 390, 396, 280 N.E.2d 230, 234:

The credibility and weight to be given to the testimony of the witnesses is a matter for the trial court's determination and will not be disturbed unless palpably erroneous. (citing People v. Ostrand, 35 Ill.2d 520, 532, 533.)

After reviewing the record, we believe the evidence adduced at the trial clearly established defendant's guilt.

Defendant urges further that he could only have been convicted of voluntary manslaughter (Ill.Rev.Stat. 1971, ch. 38, sec. 9-2), claiming that the defense evidence showed defendant to have acted under a sudden and intense passion which resulted from provocation sufficient to incite a reasonable

person to kill. Our view of this argument can be summed up by referring to People v. Hurst (1969), 42 Ill.2d 217, 247 N.E. 2d 614, wherein the court stated at page 221:

Again, as with the self-defense issue, it is the defendant's own testimony with which he attempts to establish the element of provocation. This testimony was inconsistent and conflicting and apparently disbelieved by the trial court. When such evidence is presented, it is the province of the trier of fact, whether it be court or jury, to determine whether provocation in fact existed sufficient to reduce a conviction of murder to manslaughter.

We find, with regard to this issue, that the record does not justify the substitution of our judgment for that of the trial court.

Finally, defendant insists that he did not effectively waive his right to a trial by jury, contending that said waiver was not understandingly and knowingly made. In addition to an oral jury waiver, the defendant filed with the court a written jury waiver. Based upon a review of the record and the cogent pronouncements on the subject set down in People v. Sailor (1969), 43 Ill.2d 256, 253 N.E.2d 397, we fail to find merit in defendant's contention.

Accordingly, and for the reasons stated, the judgment of the circuit court will be affirmed.

JUDGMENT AFFIRMED.

LEIGHTON, J. and HAYES, J., concur.

Abstract Only.

57935

PEOPLE OF THE STATE	)	APPEAL FROM
OF ILLINOIS,	)	CIRCUIT COURT
	)	COOK COUNTY
Respondent-Appellee,)	
)	
vs.)	
)	
CRUZ GARCIA TORRES,	)	HONORABLE
	)	REGINALD HOLZER,
Petitioner-Appellant.	)	Presiding.

PER CURIAM:

Cruz Garcia Torres (petitioner), was charged by indictment with the crime of murder. On December 28, 1967, he entered a plea of guilty and was sentenced to a term of 15 to 25 years. He appealed to this court which affirmed the judgment of conviction on May 20, 1971. (People v. Torres, 133 Ill. App. 2d 167, 272 N. E. 2d 761). On August 10, 1970, he filed a pro se post-conviction petition alleging a violation of his constitutional rights at trial (Ill. Rev. Stat. 1969, ch. 38, par. 122-1 et seq.). The public defender was appointed to represent him. On September 13, 1971, upon motion of the State, his pro se post-conviction petition was dismissed without an evidentiary hearing. He appeals that dismissal.

In his petition and in this court petitioner argues that the trial court erred in accepting his plea of guilty without first furnishing him with an interpreter, since he had a limited knowledge of the English language and was unable to understand the court's admonitions prior to entering his plea of guilty.

A proceeding under the Post-Conviction Hearing Act is a new one for the purpose of inquiring into the constitutional phases of the original conviction which have not

already been adjudicated. People v. Beckham, 46 Ill. 2d 569, 264 N. E. 2d 149; People v. Derengowski, 44 Ill. 2d 476, 248 N. E. 2d 103. Where an allegation has previously been considered and rejected by this court, any reconsideration of the same allegation in a post-conviction proceeding is barred by the doctrine of res judicata.

People v. Walker, 6 Ill. App. 3d 909, 286 N. E. 2d 812; People v. Westbrook, 5 Ill. App. 3d 970, 284 N. E. 2d 695.

The concept of res judicata includes not only all the issues raised, but any claim which could have been raised but was not, those being considered waived. People v. Adams, 52 Ill. 2d 218, 287 N. E. 2d 666; People v. Jones, 5 Ill. App. 3d 951, 284 N. E. 2d 418. This rule will be relaxed only where fundamental fairness requires it.

People v. Mamolella, 42 Ill. 2d 69, 245 N. E. 2d 485.

In the case before us, the petitioner argued in his direct appeal that there was no showing that he understood the information conveyed to him by the court. This court specifically rejected that contention, saying:

"Similarly, in the instant case, we find that there was a sufficient showing that defendant understood the information given to him by the trial judge." While his present argument is phrased in a different context, the allegation is basically the same, that petitioner did not understand the warnings given by the trial judge prior to entering his plea of guilty. Having once had a consideration of this issue in his direct appeal, petitioner is barred from any further consideration of that issue in post-conviction proceedings. The trial court properly granted the State's motion to dismiss the pro se post-conviction petition.

Even if we were to consider petitioner's argument on its merits, he was not entitled to an evidentiary hearing. In a post-conviction petition, where the allegation that a defendant did not understand English and therefore did not knowingly enter a plea of guilty is contradicted by the record, an evidentiary hearing is not always required. See People v. Ponjavich, 10 Ill. App. 3d 649, 295 N. E. 2d 16; People v. Pineda, 9 Ill. App. 3d 1014, 293 N. E. 2d 650. In the instant case, the transcript of petitioner's plea of guilty demonstrates that after being given all the admonishments by the trial court, he was asked if he still wished to enter a plea of guilty, and he replied that he did. There is no indication in the transcript that he did not fully understand what the trial court was telling him. The stipulated facts demonstrate that at the time of his arrest petitioner gave a written statement which was read into the record. That statement demonstrates that he did speak and understand English. Under these circumstances, the trial court did not err in dismissing petitioner's post-conviction petition without an evidentiary hearing.

For the foregoing reasons, the judgment of the Circuit Court of Cook County is affirmed.

Judgment affirmed.

THIRD DIVISION.

Justice McGloon did not participate.



14 I.A.³ 195



No. 57209

PEOPLE OF THE STATE OF ILLINOIS,)	APPEAL FROM THE
Plaintiff-Appellee,)	CIRCUIT COURT OF
vs.)	COOK COUNTY
EDWARD PIERCE,)	
Defendant-Appellant.)	HONORABLE
	ARTHUR L. DUNNE,
	PRESIDING.

PER CURIAM* (FIFTH DIVISION, FIRST DISTRICT):

After a jury trial, defendant was found guilty of theft (Ill. Rev. Stat. 1969, ch. 38, sec. 16-1(a) (1).) and was sentenced to a term of three to nine years.

Defendant appeals, contending that testimony was improperly admitted and that he was denied a fair trial when the prosecutor interjected extraneous, inflammatory and prejudicial matters at trial and during closing argument.

Evidence

Francisco Sanchez, for the State:

On or about August 29, 1970, he purchased for \$750 a black Impala Chevrolet and on or about July 8, 1971, it had a value in excess of \$150 and it was stolen from the 6000 block on North Lincoln Avenue. It was stipulated that the automobile when stolen had license plates BC 4908.

Stanley J. Praznowski, for the State:

He is a Chicago Police officer; on July 10, 1971, he was assigned to a squad car with his partner, William Ryan. They were in uniform and had a daily hot sheet listing license plate numbers of recently stolen cars. At about 6:15 P.M. he observed a 1964 Chevrolet ahead of their squad and it had license BC 4908. He checked the hot list and found the number on the list. The vehicle stopped for a traffic light at Armitage and Kimball and they pulled alongside. He observed the driver to be a youthful male about 25 years old, light

* MR. JUSTICE ENGLISH did not participate.



hair and wearing a white shirt. They turned on the blue flasher light in an attempt to stop the car. The car did not stop but instead picked up speed. They turned on the siren. The car was travelling at approximately 50 miles per hour when it collided with another automobile at Whipple and Wabansia. The defendant got out of the stolen car and ran into a gangway. The witness pursued 20 yards behind him. He saw the defendant turn around, take off his shirt and throw it down and run through another gangway. He was wearing white slacks. The witness and his partner re-entered their squad car and drove through an alley out onto Humboldt Boulevard where he observed the defendant being held by a citizen. He arrested the defendant.

William Ryan, for the State:

He is a Chicago Police officer. He testified in substantial accord with Praznowski. He went back and picked up the white shirt.

Karen Coerbriere, for the State:

After her competency to testify was established on a voir dire examination, it was stipulated that she would testify that she was eight years old and was riding her bicycle at about 6:15 P.M. at Whipple and Wabansia on July 10, 1971, when she was struck by a gold car and was taken to the hospital, suffering various cuts and abrasions.

Andre Montana, for the State:

On July 10, 1971, he was driving a 1969 gold Malibu near the intersection of Whipple and Wabansia and as he entered the intersection, his car was struck by a 1964 black Chevrolet. After he got out of his car, he looked for the other driver. There were squad cars all over the area, he looked for an officer and one of the officers brought the defendant to him in handcuffs, identifying the defendant to him as the driver. Defendant was wearing white slacks but no shirt at all, bare skin.

Olan Wheeler, for the State, after a motion to suppress the statement was denied:

He is a Chicago Police investigator assigned on July 10, 1971,

to investigate the case at bar. He interviewed the defendant between 7:30 and 8:00 P.M. He advised defendant of his constitutional rights. Defendant stated he had taken the car from the North side by using a screwdriver to break the ignition and that he did not have anyone's permission to take the car.

Edward Pierce, defendant;

He has been in the penitentiary on four occasions as the result of convictions of theft. That on July 10, 1971, he was on his way to his mother's home when he was asked by someone for a dime and when he replied he had none he became involved in a fight with him and three others joined him. The police arrived and arrested him. He denied driving the stolen car but admitted that he had told the detective that he had stolen the car on the North side but he was kidding, that the confession was not true but was given to get the policemen off of him.

Melvin Ship and Richard Betts, for the defense:

They both testified to defendant's good reputation for honesty and veracity.

Opinion

The defendant first argues that the testimony given by Karen Coerbiere was improperly admitted into evidence. At trial, Karen Coerbiere was called to the witness stand. The defendant then stipulated to her entire testimony. Defendant at no time objected to this testimony at trial. The failure to present a proper and timely objection to the admission of evidence constitutes a waiver thereof. (People v. McMurray (1972), 6 Ill.App.3d 129, 285 N.E.2d 242.) This is especially true in a case where the defendant stipulated to the evidence to which he now objects. People v. Holloman (1970), 46 Ill.2d 311, 263 N.E.2d 7; People v. Garnett (1969), 113 Ill.App.2d 159, 251 N.E.2d 761.

In People v. Garnett (1969), 113 Ill.App.2d 159, 251 N.E.2d 761, the defendant was convicted of attempt armed robbery. On appeal, defendant argued that he was prejudiced when the State's promise of leniency to a witness was read to the jury. At trial, the defendant did not object to this procedure. In rejecting this contention, this court

said at 113 Ill.App.2d 168, 251 N.E.2d 765:

The defendant did not object to the reading of this statement but in fact consented to its being read. Having failed to make timely objection when the remark was made precludes the defendant from urging such an objection for the first time on appeal.

In People v. Holloman (1970), 46 Ill.2d 311, 263 N.E.2d 7, the defendant on appeal argued that the State had failed to establish a proper chain of evidence. At trial, the defendant stipulated to the chain of evidence. In rejecting this contention, the court said at 46 Ill.2d 318-319, 263 N.E.2d 11:

The failure to present a proper and timely objection constituted a waiver of error, if any, and defendant may not now complain, especially in light of the fact that he stipulated to the evidence to which he now objects.

The defendant also argues that the testimony of Andre Montana, that his car was damaged when it was hit by the stolen automobile and that he thereby sustained damage to his automobile, was prejudicial. No objection was raised to any of these questions at trial. The point, if any, was therefore waived. People v. Longstreet (1971), 2 Ill.App. 3d 556, 276 N.E.2d 825.

Defendant also argues that he was denied a fair trial by the comments of the prosecutor in closing argument. To support this contention, defendant points to six incidents in the closing argument which he claims denied him a fair trial. The defendant first complains of the following arguments:

They tried to curb him and the chase commences, goes in a circular-type route, and it goes right here in the residential area in the City of Chicago, 50 miles an hour, this chase is going.

This isn't just some joy ride some kids. It is the wrong way down a one-way street, ladies and gentlemen of the jury. Thank God no one was killed.

The defendant jumps out of the car. Use your own common sense and experience. How many times have you heard instances when the person that is at fault, you read the newspapers, somebody is going down the wrong way, somebody is drunk, six people are killed a family wiped out, and the drunk driver, the fellow in the stolen car, walks away.



The police, ladies and gentlemen of the jury, are right on top of the defendant's vehicle. When the defendant jumped out, Praznowski is right on him.

* * *

I am not telling you, ladies and gentlemen, that you shouldn't have some emotion when you think about what you heard, but remember, is this the kind of conduct that we want on the streets of the City of Chicago?

* * *

If you saw a man with a kilt and a sword in his hand, a block later you saw a man with a kilt and a sword in his hand, you could be reasonably certain it is the same man.

Here is a man all dressed in white. They chase him down. They catch him and bring him back to the station. The detectives talk to him and he confesses.

Well, how important -- When you are writing up that report, you have the chase, the hot pursuit, the accident, a little girl in the hospital, another guy banged up. You run down the guy in a matter of minutes, catch him and bring him back to the station. He confesses.

In none of these first three instances did the defendant raise an objection at trial. Where a defendant fails to object to the State's closing argument at trial, he has waived his right to object and may not raise that issue on appeal. (People v. Hairston (1973), 10 Ill.App.3d 678, 294 N.E.2d 748; People v. Voss (1972), 6 Ill.App.3d 362, 285 N.E.2d 816.) Defendant urges this court to consider these instances as plain error under Supreme Court Rule 615(a). (Ill. Rev. Stat. 1969, ch. 110A, sec. 615(a).) In light of all of the facts of this case, there is no fundamental unfairness which would require the court to invoke the plain error doctrine..

In People v. Hairston (1973), 10 Ill.App.3d 678, 294 N.E.2d 748, the defendant on appeal argued that he was prejudiced by the State's closing argument. At trial, the defendant did not object to the comments of the Assistant State's Attorney. In rejecting this argument, this court said at 10 Ill.App.3d 687, 294 N.E.2d 754:

Further in the course of his argument to the jury, the State's Attorney commented on the fact that the only evidence as to where defendant was at the time of the crime was the testimony of the State's witnesses. Defense counsel characterizes this comment as a reference to defendant's failure to present an

alibi, and claims that prejudice resulted therefrom. No objections were made at any time to the comments, however, and therefore the prejudice, if any, was waived. People v. Linus, 48 Ill.2d 349, 355, 270 N.E.2d 12, 15.

In People v. Riles (1973), 10 Ill.App.3d 772, 295 N.E.2d

234, the defendant on appeal argued that the State's closing argument was prejudicial. In rejecting this contention, the court said at 10 Ill.App.3d 777, 295 N.E.2d 238:

We note that no objections were made by either of the two defense attorneys. Therefore, we need not consider these arguments since they have not been properly preserved for review. People v. Velez, 72 Ill.App.2d 324, 336, 219 N.E.2d 675. Defendants finally complain of the prosecutor's argument that the defendants had failed to produce certain witnesses and had failed to deny the crime when arrested; that these arguments had the effect of misleading the jury as to the burden of proof and the right to remain silent. Similarly, these points have not been preserved for review due to failure to object.

The defendant also argues that the following instances in the prosecutor's closing argument prejudiced him:

Now, six months later counsel says, gee whiz, they didn't write down whether he pulled up on the right side of the car in their report so add to that. I don't mean to minimize a car theft, because in any individual's life, except perhaps the very affluent, an investment in an automobile is a substantial investment for those people. You pay your money in one lump sum or you make payments on your car. It is a big investment. It is no small amount of money.

I don't mean to minimize car thefts, but for the policeman on the street on a car theft, I mean, it is not a murder, it is not some vicious rape --

MR. ENGELLAND: (Interposing) I am going to object.

THE COURT: Sustained.

* * *

You hear the hue and cry today of crime in the streets.

MR. ENGELLAND: I am going to object to that type of argument Judge. It is highly prejudicial. There is no issue here whatsoever--

THE COURT: (Interposing) Sustained.

MR. MC GEE: Law and order --

MR. ENGELLAND: (Interposing) Again, I am going to object, Judge.

THE COURT: Overruled.



MR. MC GEE: Ladies and gentlemen, again, what it comes down to in this case, you are the law and order that exists in our community. You are it. You are the police force, the prosecution, you are the defense, you are the legislator, you are the judge.

MR. ENGELLAND: I object, your Honor. There is no foundation for that statement from the evidence or anything that has come before.

In fact, they have an independent function. I think you are going to instruct them.

THE COURT: I sustain the objection.

It is a general rule that remarks and arguments of counsel, even though improper, are not grounds for a reversal of the conviction unless they cause substantial prejudice to the accused. (People v. Nilsson (1970), 44 Ill.2d 244, 255 N.E.2d 432; People v. Carroll, ___ Ill.App.3d ___, ___ N.E.2d ___ (No. 55246, decided June 5, 1973).) In the case at bar, the evidence of guilt is clear and convincing. Defendant's objections to the prosecutor's remarks were promptly sustained by the trial court. Under these circumstances, the prosecutor's comments, even if considered improper, did not cause substantial prejudice to the defendant. (People v. Smith (1972), 6 Ill.App.3d 259, 285 N.E.2d 460.) The defendant was not denied a fair trial by the closing argument of the prosecution.

In People v. Smith (1972), 6 Ill.App.3d 259, 285 N.E.2d 460, the defendant on appeal argued that he was denied a fair trial by the closing argument of the prosecutor. This court set forth the rule at 6 Ill.App.3d 263, 285 N.E.2d 463:

But more importantly, defendant does not show how the prosecutor's argument affected his right to a fair trial. In claiming that prejudicial argument was used in his prosecution, a defendant has to show that his rights were substantially prejudiced. He must show that the questionable language, considered in light of all the evidence of guilt, was a material factor in the conviction and that the verdict or finding would have been different had the language not been used.

The judgment of the circuit court of Cook County is affirmed.

Affirmed.

[ABSTRACT ONLY.]





57424

PEOPLE OF THE STATE OF ILLINOIS,	)	APPEAL FROM CIRCUIT
	)	COURT OF COOK COUNTY.
Plaintiff-Appellee,)	
)	
v.)	
)	
LOUIS WILKINS,	)	HONORABLE
	)	JAMES M. BAILEY,
Defendant-Appellant.)	)	PRESIDING.

PER CURIAM* (FIFTH DIVISION, FIRST DISTRICT):

Defendant, Louis Wilkins, was indicted for the crime of voluntary manslaughter in violation of Section 9-2 of the Criminal Code and was found guilty by a jury as charged. (Ill. Rev. Stat. 1969, ch. 38, par. 9-2.) He was sentenced to a term of four years to ten years in the penitentiary. On appeal he contends that the trial court erred in refusing to give an involuntary manslaughter instruction to the jury and that his sentence exceeds that provided for by statute.

The defendant's brief sets out the statement of facts as follows:

On July 10, 1971 the defendant was living at 550 West Englewood in Chicago with his wife (the deceased) and Michael, the nine year old son of the deceased. Upon returning home after buying a bottle of whiskey the defendant noticed his stepson through an open window in a bedroom which was off the front porch. Defendant looked in through the open window from the porch and had a clear view of the living room where he saw the deceased sitting in the lap of Cullen Mack, the landlord of the building, while Mack was ripping her pants off.

State's Evidence

The defendant entered the living room and began striking Mack with his fists and then striking Mack and the deceased with a mop handle. He went into a rage and began to stomp on the deceased with his feet. Michael was screaming "Please don't hit her anymore." The beating lasted for about 30 minutes. Mack ran up the stairs and barricaded himself in his room until the police came. The defendant and Michael then went outside and defendant told Michael

* Justice Sullivan did not participate.

"Tell them Mack did it so I won't go to jail." They then returned to the house when the defendant took a two by four into the house with him and proceeded to hit the deceased three times in the head and knocked her down a platform of the inside stairs.

James Dabney, a resident of the house testified that deceased brought some money out to the defendant, collapsed in a chair on the porch and defendant started to kick her.

Joe Towns Jr. owned a tire and body shop across the street. He saw defendant kick deceased off the porch and when she got up defendant snatched a two by four off the stairway and hit deceased across the back with it breaking the board.

Willie Towns, the brother of Joe Towns and Steve Tollert both testified that they witnessed the beating from across the street and told substantially the same story as did Joe Towns.

The medical pathologist testified that the multiple injuries that caused the death of the deceased could have been produced by fist, club, pipe or any kind of weapon.

Defendant's Evidence

The defendant testified in his own behalf and stated that he entered the bedroom through a window adjoining the front porch and saw his wife sitting on Mack's lap while Mack was ripping her pants off. He started to strike Mack. The deceased fell to the floor and blood was coming from her mouth. He slapped the deceased only once on the face and it was not hard and she didn't fall down.

Defendant contends on this appeal that he had a right to have the jury instructed as to "his theory of the case," that of involuntary manslaughter, and the court erred in refusing to give his instructions 2, 4 and 5.

Section 9-3 of the Criminal Code defines involuntary manslaughter as:

(a) A person who kills an individual without lawful justification commits involuntary manslaughter if his acts whether lawful or unlawful which cause the death are such as are likely to cause death or great bodily harm to some individual, and he performs them recklessly.



The defendant's evidence was that his wife fell to the floor from Mack's lap when he attacked Mack, causing the cut lip, and that the defendant later slapped her in the face, not hard. Neither of these acts can be said to have been such as were likely to cause death or great bodily harm. (People v. Burnett, 27 Ill.2d 510, 190 N.E.2d 338.) In People v. Brown, 89 Ill. App.2d 231, 231 N.E.2d 262, the court held under somewhat similar facts that there was no evidence presented which would entitle defendant to an instruction on the question of involuntary manslaughter; the opinion also distinguished the cases of People v. Mighell, 254 Ill. 53, 98 N.E.236, and People v. Hunter, 365 Ill. 618, 7 N.E.2d 444, cited by defendant in support of the instant contention. Defendant was not entitled to an instruction on involuntary manslaughter, and the trial court properly refused to give defendant's tendered instructions 2, 4 and 5.

Defendant's second argument is that the minimum sentence imposed upon him exceeds the minimum sentence which may be imposed under the Illinois Unified Code of Corrections which became effective since the trial. The State has not responded to this point.

Under current case law interpreting the new Code, defendant is entitled to be sentenced in accordance with its provisions where favorable to him, since the matter is yet on appeal and has not reached a "final adjudication." People v. Chupich, 53 Ill.2d 572, 295 N.E.2d 1; People v. Harvey, 53 Ill.2d 585, 294 N.E.2d 269; Ill. Rev. Stat. 1972 Supp., ch. 38, par. 1008-2-4.

Voluntary manslaughter is currently a Class 2 felony, the punishment for which is identical with that provided for in the section of the Criminal Code under which defendant was sentenced, namely, a minimum of one and a maximum of 20 years. See Ill.



Rev. Stat. 1971, ch. 38, par. 9-2; Ill. Rev. Stat. 1972 Supp., ch. 38, par. 9-2, par. 1005-8-1. However, the current Code provides that in Class 2 felonies there shall be no less than a one to three ratio between the minimum and the maximum terms set by the court. Defendant here, having been sentenced to a term of four years to ten years, is entitled to a reduction in the minimum term of his sentence.

The judgment is modified by reducing the minimum term of defendant's sentence to a term of 40 months and, as modified, the judgment is affirmed.

SENTENCE MODIFIED;
AFFIRMED AS MODIFIED.

Abstract only.





14 I.A.³ 224

57063

ALBERT VOSICKY, et al.,)	
)	
Plaintiffs-Appellants,	)	APPEAL FROM
	)	CIRCUIT COURT
v.	)	COOK COUNTY.
)	
JAMES DE LUGACH, et al.,	)	HONORABLE
	)	CHARLES J. BARRETT,
	)	PRESIDING.
Defendants-Appellees.)	

MR. JUSTICE HALLETT delivered the opinion of the court:

Plaintiffs appeal from an order denying their motion to vacate the dismissal of their case for failure to appear on a chancery progress call. They contend (1) that their suit should not have been dismissed for want of prosecution for mere inattendance of counsel on a progress call, and (2) that the refusal to vacate the dismissal was an abuse of discretion. We disagree on both points and affirm.

On September 24, 1965, the plaintiffs filed an action in chancery, seeking to set aside certain deeds and for monetary damages. All defendants appeared by various attorneys. The plaintiffs' only activity thereafter was to file 19 notices of depositions seeking the production of the same Title Company records but they never answered interrogatories served on them or appeared for depositions, despite the service of notices for them. On February 21, 1968, plaintiffs failed to appear on a regular chancery progress call and their cause was dismissed for want of prosecution.

On March 15, 1968, plaintiffs filed a motion to vacate that dismissal, accompanied by an affidavit of plaintiffs' counsel to the effect that between February 2, 1968, and February 15, 1968, he was engaged in trial in another county and was therefore unable to watch the chancery call, that his secretary was of recent employment and without legal training and that he was a sole practitioner assisted only by his secretary. With this motion was filed a so-called "affidavit of service," signed by one Kathleen M. Kennedy, and notarized by said counsel, stating



that "On March 14, 1968, I served this Motion and Affidavit by mailing a copy to each person to whom it is directed," but nowhere in the record is there any statement of the names or addresses of the persons "to whom it is directed."

Three-and-one-half-years later, the court, on October 5, 1971, apparently at plaintiffs' request, set the said motion to vacate for hearing and gave the defendants 10 days to respond. The record contains no proof of service upon defendants' attorneys of any notice that the plaintiffs were calling their said motion up for hearing on October 5, 1971, but the written response of certain defendants sets forth that some notice of said calling up was given them and that, when they appeared in court on October 5, 1971, they received, for the first time, copies of the March 15, 1968, motion to vacate and the accompanying affidavit.

On October 19, 1971, a response was filed by certain defendants stating, inter alia, that, prior, to October of 1971, no copies of said March 15, 1968, motion to vacate, or of the accompanying affidavit or of any notice of the filing of said motion and affidavit had ever been served on them. It also took the position that the matters set forth in said affidavit showed nothing more than inadvertence on the part of plaintiffs' counsel, pointed out that plaintiffs had let said motion lay for three-and-one-half-years and had also failed to answer interrogatories since June 7, 1968, and urged denial of the motion.

On November 8, 1971, the plaintiffs' said motion to vacate was denied and this appeal followed.

Under Supreme Court Rule 219(c), the trial court had authority, when plaintiffs failed to appear on a regular progress call of chancery cases, to dismiss their case for want of prosecution. (Ill. Rev. Stat. 1967, ch. 110A, par. 219(c).) As was said in Elward v. Mancuso Chevrolet Inc., 122 Ill. App.2d 421, 426, 259 N.E.2d 344:



"Under the law of this State (Athens v. Ernst, 342 Ill App 357, 96 NE2d 643; Sanitary Dist. of Chicago v. Chapin, 226 Ill 499, 80 NE 1017), the courts have inherent power to dismiss a lawsuit for want of prosecution. ***."

Although plaintiffs' counsel quotes from Mr. Justice Black's DISSENT to an order of the United States Supreme Court amending the Federal Rules of Civil Procedure and cites a number of cases relating to the court's exercise of discretion in vacating such dismissals, none challenges the trial court's basic power to dismiss for failure to attend such progress calls and none in any way supports plaintiffs' first contention that it was error for the trial court to dismiss plaintiffs' suit for the failure of their counsel to attend the regular chancery progress call.

As is reflected in our Supreme Court's affirmance of such a dismissal in Esczuk v. Chicago Transit Authority, 39 Ill. 2d 464, 467, 236 N.E.2d 719, notices of such progress calls are sent to all attorneys of record and prior notices of such calls are duly published in the Chicago Daily Law Bulletin.

We therefore pass on to plaintiffs' second contention which is that, under the facts and circumstances of this case, the court abused its discretion when it refused to vacate the dismissal.

Within 30 days after said dismissal the plaintiffs filed a motion to vacate under section 50(5) of the Civil Practice Act, Ill. Rev. Stat. 1965, ch. 110, par. 50(5), which provides that:

"(5) The court may in its discretion, before final order, judgment or decree, set aside any default, and may on motion filed within 30 days after entry thereof set aside any final order, judgment or decree upon any terms and conditions that shall be reasonable."

Only where there has been an abuse of discretion will a reviewing court interfere with the trial court's exercise of that discretion. Binder v. Dunn, 121 Ill. App.2d 30, 32, 257 N.E.2d 179.



A leading case on the exercise of this discretion is Widicus v. Southwestern Elec. Cooperative (1960), 26 Ill. App.2d 102, 167 N.E.2d 799, where the court, at page 108 said:

"In view of the fact that the statute, as it now stands, does not contain the requirement that good and sufficient cause appear, we do not believe that a court now must categorically determine that a meritorious defense or a reasonable excuse be proven to justify setting aside a default. We believe that the discretion will be properly invoked if it is based upon principles of right and wrong and is exercised for the prevention of injury and the furtherance of justice. * * *."

This case has been cited and followed in the following decisions by various appellate courts throughout the State:

Lynch v. Illinois Hospital Services, Inc.,
38 Ill. App.2d 470, 473-474, 187 N.E.2d 330;
Wolder v. Wolder,
30 Ill. App.2d 98, 101, 173 N.E.2d 546;
Trojan v. Marquette Nat. Bank,
88 Ill. App.2d 428, 437-438, 232 N.E.2d 160;
Mieszkowski v. Norville,
61 Ill. App.2d 289, 293-294, 209 N.E.2d 358;
Sentry Royalty Co. v. Craft,
79 Ill. App.2d 410, 418-419, 226 N.E.2d 282;
Adams v. Grace,
128 Ill. App.2d 69, 76-77, 262 N.E.2d 489;
Megan v. L. B. Foster Co.,
1 Ill. App.3rd 1036, 1039, 275 N.E.2d 426.

Plaintiffs' counsel cites and quotes from Yott v. Yott, 257 Ill. 419, 423, 100 N.E. 902; and Epley v. Epley, 328 Ill. 582, 585, 160 N.E. 113. In Yott, a will contest was involved and various defendants were still unserved, a guardian for an insane defendant had yet to be appointed and the case had been pending for only six months. Epley likewise was a will contest, with three or four unserved defendants and had not been pending long. In the case at bar, all defendants had long since appeared by their attorneys and interrogatories had been served on plaintiffs and their depositions sought, both unsuccessfully.

In Deardorff v. Decatur and Macon C. Hospital Ass'n., 111 Ill. App.2d 384, 250 N.E.2d 313, the plaintiff moved, within 30 days, to vacate the dismissal of his suit for want of prosecution. After citing and discussing Widicus, supra, and



Esczuk, supra, the court in affirming the trial court's refusal to vacate, at page 390, said:

"* * * In our judgment, in weighing the discretion exercised by the trial court in this case, we deal with equitable principles. In Esczuk, if there was no error in dismissing the case for want of prosecution where substantially greater diligence was displayed than is shown in the record before us, we cannot say that the trial court abused his discretion in dismissing this cause for want of prosecution. Here a plaintiff either inadvertently overlooked or was too preoccupied with other matters to give it any attention. He was galvanized into action only when the trial court moved. The desirability of resolving lawsuits by a trial on the merits is not aided where either a plaintiff or a defendant, as the case may be, does not show reasonable diligence in bringing about that result. The right to a trial on the merits or to present a defense means the utilization by a party of that right within a reasonable time. The goal of a trial on the merits is not achieved by soporific inactivity. We cannot say in this record that the trial court abused his discretion in dismissing this suit and we, therefore, must affirm the judgment. It is so ordered."

Let us now apply these principles to the matters set out in the affidavit filed by plaintiffs' counsel on March 15, 1968. In it, counsel says that between February 2, 1968, and February 15, 1968, he was engaged in trial in another county and was therefore unable to watch the chancery progress call, that his secretary was of recent employment and without legal training and that he was a sole practitioner, assisted only by his secretary.

As pointed out previously, cards are sent attorneys of record and prior notices of such progress calls are duly published in the Chicago Daily Law Bulletin.

As our Supreme Court, in Esczuk v. Chicago Transit Authority, 39 Ill.2d 464, 236 N.E.2d 719, at page 468, said:

"* * * The gist of her argument is that it is difficult, if not impossible, for a small law office to check each of its cases in the Law Bulletin. We do not agree. While the task is not an easy one, it is less onerous



than to require the litigant to be in daily attendance at court to check his case. Cf. Bonney v. McClelland, 235 Ill. 259."

Even assuming that counsel was tied up in another county until February 15, 1968, the progress call was held on February 21, 1968, almost a week later, and no scintilla of an excuse is given for this period.

But this is not the full story. As above pointed out, no notice was given to the attorneys for the various defendants of the filing of said motion and affidavit and the motion to vacate then lay in the court files for over three-and-one-half-years before counsel called it up.

In Vlahakis v. Parker, 3 Ill. App.3rd 126, 278 N.E.2d 523, No. 55752, 1st Dist., 1971 (Abst. opinion), the plaintiff's motion to vacate a dismissal for want of prosecution was filed on the 28th day but notice of the filing of such motion was not given to defendant's attorneys until the 31st day. In affirming the trial court's refusal to vacate, this court, at pages 2 and 3, stated:

"* * * Supreme Court Rule 104(b) requires that '[p]leadings subsequent to the complaint, written motions and other papers * * * shall be filed with the clerk with a certificate * * * or other proof that copies have been served on all parties who have appeared * * *.' Ill. Rev. Stat. 1969, ch. 110A, par. 104(b). * * *."

"In general, where statutes or rules so specify, or where principles of natural justice require, notice that a motion will be presented to the court must be given the adverse party. 60 C.J.S. Motions and Orders, §15. Although notice of a motion can be waived by the party entitled, an order entered on a motion without notice is void. Petition of Volpe, 328 Ill. App. 311, 66 N.E.2d 146. It is a well-recognized rule that a court cannot vacate or modify the substance of a legal order without notice to interested parties because in the absence of notice the vacature or modification is null and void. See Schmahl v. Aurora Nat. Bank, 311 Ill. App. 228, 35 N.E.2d 689; 37 Am. Jur. Motions, Rules and Orders §9; compare Curran v. Abbot, 141 Ind. 492, 40 N.E. 1091 (1895); Bratberg v. Advance-Rumely Thresher Co., 61 N.D. 452, 238 N.W. 552 (1931); Edgar v. Garrett, 10 Ariz.App.



98, 456 P.2d 944 (1969).

"The order which dismissed appellant's suit was a default judgment. Under Ill. Rev. Stat. 1969, ch. 110, par. 50(5), for 30 days on appellee's motion, the trial court had the power to set aside the default. Binder v. Dunn, 121 Ill. App. 2d 30, 257 N.E. 2d 179; compare Carqueville Co. v. Gladstone, 106 Ill. App.2d 375, 245 N.E.2d 900. The motion, however, had to comply with requirements of the statute; that is, it had to be a motion capable of supporting a valid order. A motion without notice does not possess this capacity. See Petition of Volpe, supra; Schmahl v. Aurora Nat. Bank, supra; compare Elliot Construction Corporation v. Zahn, 99 Ill. App. 2d 112, 241 N.E. 2d 129."

So far as the certified record is concerned, there is no showing as to why plaintiffs' counsel delayed more than three-and-one-half-years in calling said motion up for hearing.

Plaintiffs' counsel, in his short record (not certified to by the clerk of the circuit court), includes what purports to be an unsigned, unconformed copy of another affidavit by him, dated October, 1971, purporting to explain this long delay, and he refers to it at length in his brief. No such affidavit appears anywhere in the certified record and the register in the circuit court does not reflect the filing of any such affidavit. Nor do the defendants' responses to the motion to vacate reflect the filing of any such second affidavit.

In any event, said affidavit, according to plaintiffs' own brief, does not set out facts sufficient to justify the delay of this case. It should also be noted that plaintiffs have never answered interrogatories served on them or appeared for depositions for which they were noticed.

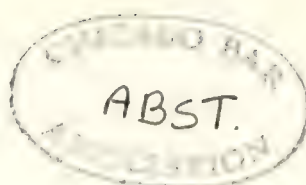
It would, indeed, be difficult to conceive of a situation where the trial court could have better reason to deny a motion to vacate a dismissal for want of prosecution.

We therefore affirm the judgment of the circuit court.

JUDGMENT AFFIRMED.

Burke, P.J. and Goldberg, J., concur.





57541

PEOPLE OF THE STATE OF ILLINOIS,)	
	)	APPEAL FROM THE CIRCUIT
Plaintiff-Appellee,	)	COURT OF COOK COUNTY.
)	
vs.)	
)	
RICHARD C. BENNETT,	)	HON. KENNETH R. WENDT,
	)	Presiding.
Defendant-Appellant.)	

*PER CURIAM (FIRST DISTRICT, FIRST DIVISION):

The defendant, Richard C. Bennett, was charged with the offense of unlawful use of a weapon in that he carried concealed on his person a pistol in violation of Section 24-1 (a-4) of the Criminal Code (Ill.Rev.Stat. 1969, ch.38, par. 24-1.) After a bench trial, the defendant was found guilty and sentenced to a term of not less than one year nor more than three years in the State Penitentiary.

The sole issue on appeal is whether the trial court erred in denying the motion to suppress the pistol.

Prior to trial a hearing was held on defendant's motion to suppress a Browning automatic pistol as evidence in the trial. Police Officer James Bigelow testified that on May 2, 1971, at approximately 6:15 P. M. he and his partner were in uniform and on patrol in the high crime rate area of Madison and Ogden, Chicago, when Bigelow's attention was called to the defendant, who was standing in an alley. Bigelow did not have a warrant for the defendant's arrest nor did he see the defendant do anything in violation of any city ordinance, State or Federal law. Bigelow walked up to the defendant and when he was a foot or two away the defendant put his hand inside his jacket. Bigelow grabbed the defendant's hand and a .38



caliber Browning automatic pistol fell to the ground. Bigelow had no conversation with the defendant until the defendant reached into his jacket. Bigelow then told the defendant to stop.

The defendant testified that he was bending over wiping his shoes, looked around at the garbage can, and then backed up a little bit when the police officer approached him and asked him if he had put "dope" in his shoes. The defendant denied having any dope. The defendant further testified that the police officer then said "Oh, how about a little shakedown?"; defendant said "Okay"; and then the police officer said, "Okay, put your hands up there beside the wall."

The defendant also testified that during the course of the frisk the pistol, which he was carrying in his expansive belt, was accidentally touched by him and it fell down through his pants leg to the ground. The defendant denied ever having put his hand inside his coat when the police officer was coming because he "had better sense than that. I never put any hand inside my coat when the officer coming [sic]."

The trial court denied the motion to suppress.

At a pretrial conference counsel for the defendant stipulated that the testimony which had been adduced during the motion to suppress stand as evidence on the trial and also admitted that the defendant had been convicted of robbery in 1935.

At the trial Police Officer Bigelow identified Plaintiff's Exhibit 1 as the gun taken from the defendant. He said that the gun was loaded, with one bullet in the chamber ready to fire.

On cross-examination Bigelow testified that the first time he saw the weapon it was on the ground; that the gun fell out



through the man's pant leg; that Bigelow did not feel any gun on the defendant's person; and that Bigelow just grabbed the defendant's hand. Bigelow said he told his partner that the defendant had a gun and then Bigelow's partner pulled out his revolver, pointed it at the defendant and told the defendant that if he moved for the gun he was going to shoot him.

The defendant testified that he received possession of the gun from a girl who was at his house; that he was in the alley and was going to give the gun to the police or put it in the garbage can; and that was when the police came.

On cross-examination the defendant testified that he had the pistol in his possession for only a few minutes before the police arrived.

The defendant contends that the police officer had no probable cause to arrest him and, therefore, the evidence seized after such arrest was improperly admitted into evidence. The State argues that the police officer had not placed the defendant under arrest when he grabbed his hand but rather was protecting himself against what he reasonably suspected was an effort by the defendant to reach for a gun and, therefore, the police officer's actions were defensive in nature and in accordance with the law.

Section 107-14 of the Criminal Code (Ill.Rev.Stat. 1971, ch.38, par.107-14) provides in part that a police officer may stop a person in a public place for a reasonable period of time when the officer reasonably infers from the circumstances that a person has committed a crime; and that he may demand a person's name, his address, and an explanation of his actions.

The threshold inquiry by a police officer of a citizen does not require the existence of probable cause but rather the



appropriate circumstances under which the officer may investigate possible criminal behavior. People v. Howlett (1971), 1 Ill.App.3d 906, 274 N.E.2d 885. Terry v. Ohio (1967), 392 U.S. 1, 88 S.Ct. 1868, 20 L.Ed.2d 889; People v. Lee (1971), 48 Ill.2d 272, 269 N.E.2d 488; People v. Staples (1971), 1 Ill.App.3d 922, 275 N.E.2d 259. See also Ill.Rev.Stat. 1971, ch.38, pars. 107-14 and 108-1.01.

In Adams v. Williams (1972), 407 U.S. 143, 32 L.Ed.2d 612, 92 S.Ct. 1921, the court reiterated the rationale of the Terry case and stated (32 L.Ed.2d, p.617):

"The Court recognized in Terry that the policeman making a reasonable investigatory stop should not be denied the opportunity to protect himself from attack by a hostile suspect. 'When an officer is justified in believing that the individual whose suspicious behavior he is investigating at close range is armed and presently dangerous to the officer or to others,' he may conduct a limited protective search for concealed weapons. Id. at 24, 20 L.Ed.2d at 908."

In the case at bar the police officer, who with his partner was on patrol in the high crime area of Madison and Ogden, Chicago, saw the defendant standing in the alley. As the police officer approached the defendant, the defendant put his hand inside his jacket. At that point the police officer was justified in believing that the defendant, whose suspicious behavior he was investigating at close range, was armed and presently dangerous to the police officer. And, therefore, it was reasonable for the police officer to protect himself from probable attack by grabbing the defendant's hand, after which a .38 Browning automatic pistol fell to the ground.

The trial court accepted the testimony of the police officer who "saw the arm go into the jacket within two feet, the officer has a normal right to frisk, and according to Terry v. Ohio,



when he does attempt to find out, evidently this thing fell out through his pants, and hit the ground"; and that, therefore, the defendant was guilty of the unlawful use of a weapon. The motion to suppress was properly denied.

In a bench trial in a criminal case, in view of the opportunities of observation available to the trial court, a reviewing court will not set aside a guilty finding unless the proof is so unsatisfactory or implausible as to justify a reasonable doubt of the defendant's guilt. (People v. Hutchins (1970), 127 Ill.App.2d 296, 304, 262 N.E.2d 258; People v. Bracey (1970), 127 Ill.App.2d 57, 62, 262 N.E.2d 748; People v. Catlett (1971), 48 Ill.2d 56, 64, 268 N.E.2d 378.) In the case at bar there was ample evidence to support a guilty finding beyond a reasonable doubt.

There is no error in the record and, therefore, the judgment of the trial court is affirmed.

JUDGMENT AFFIRMED.

*Mr. Presiding Justice Joseph Burke did not participate.

Abstract Only.



ABST

14 I.A.³ 226

57694

PEOPLE OF THE STATE OF ILLINOIS,)	
	)	APPEAL FROM THE CIRCUIT
Plaintiff-Appellee,	)	COURT OF COOK COUNTY.
)	
vs.)	
)	
DEWITT QUINN,	)	HON. ARTHUR L. DUNNE,
	)	Presiding.
Defendant-Appellant.)	

Mr. JUSTICE GOLDBERG delivered the opinion of the court:

After a bench trial, Dewitt Quinn (defendant) was found guilty of rape. (Ill.Rev.Stat. 1969, ch.68, par.11-1(a).) He was sentenced to the penitentiary for four to eight years. He appeals.

In this court, defendant contends that uncorroborated testimony by the complaining witness, which was denied by him, did not establish his guilt beyond a reasonable doubt; and the statute under which he was sentenced, which requires a mandatory minimum sentence of four years, violates Article 1, sec.11 of the Illinois Constitution of 1970. The State contends that the evidence of guilt is beyond a reasonable doubt and that the provision for the obligatory four year minimum term did not violate the constitution of Illinois.

The complaining witness testified that on February 19, 1971, at approximately 9:30 p. m., she left her apartment, where she lived with her husband and brother-in-law, and walked to a neighboring store to buy some items for herself and her baby. She was suddenly accosted by the defendant who seized her by the arm and dragged her down the street and through an alley to a basement window. He removed the window and forced her to enter the basement. During this time, he generally kept one hand hidden in his



pocket and threatened her with death. She was then having her menstrual period but he forced her partially to remove her clothes and had intercourse with her. The two then left the basement together, with him holding her forcefully by the arm. At his insistence, they entered a store together and she bought cigarettes for him. Defendant suggested that he come to her home and listen to some records and she responded affirmatively because she knew that her brother-in-law was home. On the way, she saw a police car and readied herself to scream for help but defendant threatened her life and she desisted.

They entered the apartment building where she lived and started to walk up to the third floor with defendant following her. She rang the bell and her brother-in-law opened the door. As they neared her apartment, she screamed to her brother-in-law that she had been raped. Defendant fled with the brother-in-law in pursuit. The latter testified that when he opened the door and the complaining witness approached the landing, he heard her crying. She screamed that she had been raped. He chased and apprehended the defendant and threw him down to the floor. He told the complaining witness to call the police. She told him what had happened and that defendant would probably have blood about him. He ripped the defendant's trousers open and found blood on his underclothing. Defendant said to him, "I should go to jail for letting her trick me coming over here after this."

A police officer testified that he saw two men struggling in the hallway. One of the men said that the other had just raped his sister-in-law. They then arrested defendant. The brother-in-law showed them the blood stains on defendant's underclothing. The complaining witness showed them the building where the offense had allegedly taken place and they noted that a screen had been removed from a basement window. The parties stipulated that a qualified person would testify that microscopic examination



would reveal that the complaining witness' coat, and also the defendant's shorts, contained human sperm and blood.

Defendant's fiancée testified in his behalf that they had sexual intercourse during the early evening hours of the same day. She was concluding her menstrual period and defendant had failed to remove his shorts. Defendant testified in his own behalf that this was true and that he left his fiancée's home to see a friend who owed him some money and who lived in the same apartment building as the complaining witness. As he entered the building, he saw a young lady in front of him. When the buzzer sounded and she walked in, he followed. He noticed that she was crying or sniffing. He was walking upstairs to his friend's apartment, on the second floor, when he heard the complaining witness, who was ahead of him, scream "There he is, he raped me!" Thereupon a man came running down the stairs and attacked defendant so that he stumbled downstairs. He asked the attacker what he was doing and what was wrong and denied that he had made any statement which implicated him in illegal or wrongful acts.

The above review of the evidence is sufficient to demonstrate that it is ample to sustain the finding of guilty beyond a reasonable doubt. The testimony of the complaining witness is positive and unshaken. Contrary to defendant's contention, it is corroborated by the testimony of her brother-in-law as well as by the physical evidence of the stains upon her coat and defendant's shorts. As against this, the testimony of the defendant is corroborated only in part by his fiancée. The question of credibility here was definitely one for resolution by the trial court which we should not reverse.

The following language used by our Supreme Court in a recent decision affirming a conviction for rape is especially apt and



pertinent here as follows (People v. Reese, 54 Ill.2d 51, 57, 58, 294 N.E.2d 288):

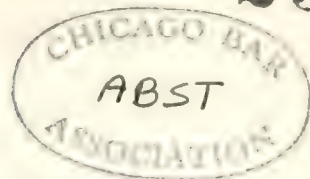
"Courts of review have a special duty of carefully examining the evidence in rape cases. (People v. Qualls, 21 Ill.2d 252.) But in doing so the court may not encroach upon the function of the trier of fact to weigh credibility and otherwise assess the evidence which was presented. (People v. Springs, 51 Ill.2d 418.) That evidence has been conflicting will not justify a reversal of a finding by the trier of fact. (People v. Springs, 51 Ill.2d 418; People v. Hiller, 7 Ill.2d 465.) A court of review will not set aside a finding of guilty unless the evidence is so palpably contrary to the finding or so unreasonable, improbable or unsatisfactory as to cause reasonable doubt as to the guilt of the accused. People v. Sumner, 43 Ill.2d 228."

As regards the question of constitutionality of the applicable statute, we have carefully examined the entire record and find that this issue was never raised in any manner in the trial court and is now raised here for the first time. In this situation, since this is the first point at which the issue of constitutionality of the statute has been raised, we will not consider the question on appeal. People v. Amerman, 50 Ill.2d 196, 197, 279 N.E.2d 353; People v. Eubank, 46 Ill.2d 383, 394, 263 N.E.2d 869.

The judgment appealed from is accordingly affirmed.

JUDGMENT AFFIRMED.

BURKE, P.J., and HALLETT, J., concur.



58031

PEOPLE OF THE STATE OF ILLINOIS,)	APPEAL FROM
Plaintiff-Appellee,)	
vs.)	CIRCUIT COURT,
)	COOK COUNTY.
LONZY HARRIS,)	
Defendant-Appellant.)	HON. FRANK J. WILSON, Presiding.

*PER CURIAM (FIRST DIVISION, FIRST DISTRICT):

Lonzy Harris, hereinafter called petitioner, appeals from an order dismissing his post-conviction petition filed pursuant to the Post-Conviction Hearing Act (Ill.Rev.Stat. 1969, ch. 38, par. 122-1 et seq.) without an evidentiary hearing. On appeal, petitioner argues that he was entitled to an evidentiary hearing on the allegations in his post-conviction petition: (1) that he was denied a fair trial when the trial judge submitted a jury instruction on voluntary manslaughter, since there was no evidence to support that instruction; (2) that he was denied due process of law when the trial court submitted a jury instruction on voluntary manslaughter, since this usurped the jury function as trier of fact; and (3) that the State's closing argument was prejudicial.

Petitioner was originally indicted for the crime of murder. After a jury trial, he was found guilty of the crime of voluntary manslaughter and sentenced to a term of five to ten years. Petitioner appealed and on May 11, 1970, we affirmed his conviction. People v. Harris, 124 Ill.App 2d 234, 260 N.E.2d 325. On November 12, 1970, petitioner filed a pro se post-conviction petition. On February 5, 1971, and March 4, 1971, petitioner filed supplementary petitions. On April 22, 1971, upon motion of the State, petitioner's post-conviction petition was dismissed without an evidentiary hearing.

A proceeding under the Post-Conviction Hearing Act is a new



proceeding for the purpose of inquiring into the constitutional phases of the original conviction which have not already been adjudicated. People v. Beckham, 46 Ill.2d 569, 264 N.E.2d 149; People v. Derengowski, 44 Ill.2d 476, 256 N.E.2d 455. Where an allegation has previously been considered and rejected by this court, any reconsideration of the same allegation in a post-conviction proceeding is barred by the doctrine of res judicata. People v. Weaver, 45 Ill.2d 136, 256 N.E.2d 816; People v. Mims, 10 Ill.App.3d 147, 294 N.E.2d 71. The concept of res judicata also includes all claims which were known from the original trial record and could have been raised on direct review but were not, those claims being considered waived. People v. Adams, 52 Ill.2d 224, 287 N.E.2d 695; People v. Jones, 5 Ill.App.3d 951, 284 N.E.2d 418. This rule will be relaxed only where fundamental fairness requires it. People v. Mamolella, 42 Ill.2d 69, 245 N.E.2d 485; People v. Keagle, 37 Ill.2d 96, 224 N.E.2d 834.

In the case at bar, all three of petitioner's allegations result from the original trial record. Petitioner's allegation that the trial judge improperly submitted a jury instruction on voluntary manslaughter since there was no evidence to support a verdict of voluntary manslaughter was specifically rejected in petitioner's direct appeal when this court ruled that there was sufficient evidence to justify petitioner's conviction of voluntary manslaughter. Having once had a review of that issue, petitioner cannot now seek to relitigate that issue in a post-conviction proceeding. Petitioner's arguments as to the trial judge usurping the function of the jury and as to the allegedly prejudicial closing argument of the State were known from the trial record but were not raised in petitioner's direct appeal. Petitioner's failure to raise those issues in his direct appeal does not allow him to raise them in post-conviction proceedings.

For the foregoing reasons, the judgment is affirmed.





57857

PEOPLE OF THE STATE OF ILLINOIS,)	
)	
Plaintiff-Appellee,	)	APPEAL FROM THE CIRCUIT
	)	COURT OF COOK COUNTY.
vs.)	
)	
JIMMIE WALLACE,	)	HONORABLE THOMAS P. CAWLEY,
	)	Presiding.
Defendant-Appellant.))	

PER CURIAM:*

Jimmie Wallace (defendant) and Freddie Gwynn were charged with theft and battery in violation of Sections 12-3 and 16-1 of the Criminal Code. Ill. Rev. Stat. 1971, ch. 38, pars. 12-3, 16-1. After a bench trial, both were found guilty on both charges. Wallace was sentenced to one year on the charge of theft and six months on the charge of battery to run concurrently. Only Wallace appeals, arguing that he was not proved guilty beyond a reasonable doubt because the identification testimony was uncertain, vague and doubtful and that he was improperly sentenced for both theft and battery since both crimes arose out of the same course of conduct.

At trial the following evidence was adduced: Barbara Rhymes testified that on June 11, 1972, at approximately 11:00 P.M., she was leaving the University parking lot at 905 South Wood Street, Chicago, Illinois, when she was approached by two young men. She identified the two men as Jimmie Wallace and Freddie Gwynn. Gwynn approached her from one side and said, "Give it up, lady, this is for real, this is a zip gun." Wallace approached her from the other side and began to pull on her handbag. Miss Rhymes was pulled across the sidewalk and pushed down in the street, with Gwynn falling on top of her. As she fell, she observed a small bus come down the street and stop. Defendants ran, taking her purse containing approximately \$7.00. She suffered a dislocated left shoulder and a



fractured humerus as the result of the attack. The entire incident took several minutes. The driver of the small bus, Mr. Harris, came to her aid. Approximately fifteen minutes after the incident at the University of Illinois hospital the police brought two men on two separate occasions into the emergency room where she was lying on a stretcher. She identified one of the men (namely, defendant), but stated she could not be certain about the second man. The following day the police showed her photographs of five or six men. She positively identified both defendants as the perpetrators of her assault. Miss Rhymes stated that the men were not clean shaven, but that she did not check that closely as to whether the men had beards or mustaches.

Christopher Harris testified that on June 11, 1972, at approximately 11:00 P.M., he was driving in the vicinity of 905 South Wood Street, Chicago, Illinois, when he observed two men run across the street from Miss Rhymes, who was lying on the ground. The men ran in front of the headlights of his vehicle and he was able to observe their faces. A police car came by the scene and took Mr. Harris on a tour of the area. Approximately one block away, Mr. Harris identified Gwynn and Wallace as the men he had seen running from Miss Rhymes.

William Thomas, a University of Illinois police officer, testified that on June 11, 1972, at approximately 11:25 P.M., he had occasion to take part in an investigation of the strong arm robbery of Barbara Rhymes. Gwynn and Wallace had been arrested and a show-up was conducted in the emergency room of the University of Illinois Hospital. When arrested, Gwynn and Wallace had United States currency in their possession, but had no weapons.

Freddie Gwynn testified that on June 11, 1972, he was arrested while walking down the street with Jimmie Wallace. Prior to being arrested he had never seen Miss Rhymes. He was taken to the emergency room of the University of Illinois Hospital, where Miss Rhymes stated



that Wallace was not one of the offenders, but that she was not sure about Gwynn. The police then made Gwynn and Wallace exchange jackets and they were again viewed by Miss Rhymes. He denied taking Miss Rhymes' purse or striking her in any way.

Jimmie Wallace testified that on June 11, 1972, he was at his mother's house when his girl friend called and asked him to come over. He was walking down the street with Gwynn when he was placed under arrest. He denied ever seeing Barbara Rhymes prior to being arrested. After being placed under arrest, he was taken to the University of Illinois Hospital and brought before Miss Rhymes, who stated that he was not the man who robbed her, but that she was not sure about Gwynn. The police had Wallace and Gwynn exchange jackets and they were again brought in to be viewed by Miss Rhymes. He denied taking Miss Rhymes' purse or striking her.

Marie Wallace, Jimmie Wallace's mother, testified that on June 11, 1972, defendant Jimmie Wallace was at her home when he received a telephone call from his girl friend at approximately 10:00 P.M. Thereafter Jimmie Wallace left her home.

Defendant first contends that he was not proved guilty beyond a reasonable doubt because the identification by Barbara Rhymes and Christopher Harris was uncertain, vague and doubtful. In addition to his alibi defense, defendant points to several factors which he believes raise a reasonable doubt about the accuracy of his identification. As to Barbara Rhymes, defendant argues that her testimony is entitled to little weight because she had a limited opportunity to observe the defendant late at night, she was frightened, she was unable to state whether or not the men had facial hair, and while in the emergency room of the hospital she was able to identify only one of the men. As to Christopher Harris, defendant argues that he had an opportunity to observe the defendants for only a few seconds, never described their faces, was unable to note if either of the men had facial hair, and stated that the defendant's age was between



18 and 20, when in fact defendant was 25 years of age.

Minor omissions or discrepancies in the descriptions given by a witness do not necessarily affect the validity of the identification, but go only to the weight to be given that evidence. People v. Bennett, 9 Ill.App.3d 1021, 293 N.E.2d 687. Similarly, the question of a witness' failure to notice or describe defendant's mustache or facial hair is not a prerequisite to identification, but merely goes to the weight to be attached to the identification testimony. People v. Robinson, 3 Ill.App.3d 843, 279 N.E.2d 526. The fact that a witness may view a defendant for only a short period of time during the incident does not discredit the identification, but again goes only to the weight to be given that testimony. People v. Wright, 10 Ill.App.3d 1035, 295 N.E.2d 510. It is the function of the trier of fact to make the initial determination as to the credibility of each witness. This court will not substitute its determination of the weight and credibility to be given the testimony of witnesses for that of the trial court, unless the trial court's determination is palpably erroneous. People v. Arndt, 50 Ill.2d 390, 280 N.E.2d 230.

In the case at bar, Miss Rhymes was able to view her assailants for several minutes during the incident. She identified defendant at the hospital and the next day from a photograph of five or six individuals. She also positively identified him at the trial. Christopher Harris was able to view the defendants for several seconds when they ran in front of the headlights of his vehicle. He identified both defendants within one block of the scene of the crime within minutes after the crime. After a full review of the record, we believe that the identification testimony in the case at bar was positive and credible. There is ample evidence to support the trial court's finding that the defendant was proved guilty beyond a reasonable doubt.

Defendant also argues that a reasonable doubt of his guilt was raised by his alibi defense, which was corroborated by his mother's testimony. The weight to be given to an alibi defense is a question



for the trier of fact. People v. Holmes, 6 Ill.App.3d 254, 285 N.E.2d 561. The trial court is not obliged to believe a defendant's alibi, especially in a situation such as the instant case where the corroborating testimony does not extend to the time during which the crime was committed. People v. Robinson, 3 Ill.App.3d 843, 279 N.E.2d 526.

Defendant's second contention is that he was improperly sentenced for both theft and battery, since both crimes arose out of the same course of conduct. In People v. Lewis, ____ Ill.App.3d ____, ____ N.E.2d ____ (No. 57320, decided June 27, 1973), the defendant was convicted of both battery and theft upon evidence that the victim was approached by two men, one of whom grabbed her purse. During the struggle for her purse, the victim was knocked to the ground. We reversed the judgment for battery, noting that there appeared to be no independent motivation to inflict bodily harm. In the case at bar, the battery occurred during the defendant's struggle with Miss Rhymes for possession of her purse. Since the conduct which constituted the offense of battery was part of the conduct which constituted the offense of theft, only one sentence may properly be imposed.

For the foregoing reasons, the judgment of the Circuit Court of Cook County is affirmed in part and reversed in part.

AFFIRMED IN PART,
REVERSED IN PART.

(FIRST DISTRICT, SECOND DIVISION)

* Downing, J., did not participate.

PUBLISH ABSTRACT ONLY.

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57193

PEOPLE OF THE STATE OF ILLINOIS,)	
)	
Respondent-Appellee,)	APPEAL FROM THE CIRCUIT
	)	COURT OF COOK COUNTY.
vs.)	
	)	HON. NATHAN M. COHEN,
RAYMOND WHITE,	)	Presiding.
)	
Petitioner-Appellant.)	

*PER CURIAM (FIRST DISTRICT, FIRST DIVISION):

Petitioner appeals from an order denying his pro se post-conviction petition, filed pursuant to the Post-Conviction Hearing Act (Ill.Rev.Stat. 1969, ch.38, par.122-1 et seq.), without an evidentiary hearing. On appeal, petitioner's only argument is that the representation afforded him at the hearing on his post-conviction petition was inadequate.

Petitioner was convicted of murder after a jury trial and was sentenced to a term of 17 to 20 years. Petitioner appealed and on May 26, 1967, this court affirmed the conviction. (People v. White, 84 Ill.App.2d 178, 228 N.E.2d 169.) On August 25, 1970, petitioner filed a pro se post-conviction petition. The public defender was appointed to represent petitioner.

On June 14, 1970, a hearing was held on the State's motion to dismiss petitioner's pro se post-conviction petition. At the hearing, the assistant public defender representing petitioner stated that he personally had correspondence with the petitioner and had personally read the transcript of proceedings as well as the pro se post-conviction petition. Pursuant to these actions, counsel contacted the wife and mother of petitioner in an effort to find support for the allegations of the pro se post-conviction petition. Counsel then went through each of



petitioner's allegations in the pro se post-conviction petition and concluded that none of the points raised a substantial violation of petitioner's constitutional rights. Petitioner's pro se post-conviction petition was then denied without an evidentiary hearing.

Petitioner's only argument on appeal is that his court-appointed attorney did not adequately represent him at the post-conviction proceedings. Petitioner bases this argument upon the fact that counsel did not comply with Supreme Court Rule 651(c) (Ill.Rev.Stat. 1971, ch.110A, par.651(c)) in that the report of proceedings does not affirmatively show that court-appointed counsel consulted with petitioner or made any necessary amendments to the original pro se petition. Supreme Court Rule 651(c) states:

"The record filed in that court shall contain a showing, which may be made by the certificate of petitioner's attorney, that the attorney has consulted with petitioner either by mail or in person to ascertain his contentions of deprivation of constitutional right, has examined the record of proceedings at the trial, and has made any amendments to the petition filed pro se that are necessary for an adequate presentation of petitioner's contentions."

In the case at bar, the record does contain an affirmative showing that appointed counsel did consult with petitioner by mail. The record also shows that pursuant to this communication, as well as the reading of the trial transcript and the pro se post-conviction petition, counsel did further outside investigation in an attempt to substantiate petitioner's contentions. The fact that there was no certificate of the attorney filed and that there was no personal interview with petitioner is not dispositive. Supreme Court Rule 651(c) states that consultation may be either by mail or in person. In the case at bar, counsel's consultation with petitioner did comply with Supreme Court Rule 651(c).



Petitioner also argues that his attorney failed to comply with Supreme Court Rule 651(c) in that he did not file any amendments to the pro se post-conviction petition. In People v. Smith, 40 Ill.2d 562, 241 N.E.2d 413, petitioner appealed the dismissal of his pro se post-conviction petition, arguing that his representation at the post-conviction hearing was inadequate in that his attorney did not seek leave to amend the petition. In rejecting that contention, the court said (40 Ill. 2d at 564):

"While appellate counsel asserts defendant's representation in the post-conviction hearing was inadequate in that leave to amend the petition should have been sought, no motion for leave to amend was there made nor does there appear any reason to believe the petition could have been successfully amended."

See also People v. Goodwin, 5 Ill.App.3d 1091, 284 N.E.2d 430; People v. Burns, 4 Ill.App.3d 893, 282 N.E.2d 185.

In the case at bar, petitioner's representation in the post-conviction proceedings complied with all of the requirements of Supreme Court Rule 651(c). Petitioner's counsel had consulted with him, had completely reviewed the trial transcript and the pro se post-conviction petition. In addition, counsel did outside investigation in an attempt to substantiate petitioner's contentions. Petitioner's wife and mother were present in open court. At the hearing, counsel carefully went over each of petitioner's allegations and stated why each argument could not be successfully raised in post-conviction proceedings. Petitioner's counsel then concluded that he could find no points which would demonstrate a substantial violation of petitioner's constitutional rights. The failure of petitioner's counsel to amend the post-conviction petition does not establish inadequate



representation since there is no showing that the petition could have been successfully amended to state a cause upon which post-conviction relief could have been granted.

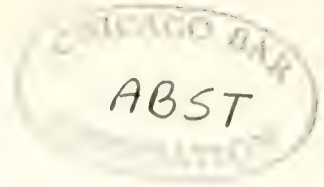
For the foregoing reasons, the judgment of the circuit court of Cook County is affirmed.

JUDGMENT AFFIRMED.

*Mr. Presiding Justice Joseph Burke did not participate.

Abstract Only.

57269



PEOPLE OF THE STATE OF ILLINOIS,) APPEAL FROM
 Plaintiff-Appellee,)
)
 v.) CIRCUIT COURT,
)
) COOK COUNTY.
 DOUGLAS JONES,)
 Defendant-Appellant.) HON. JOHN A. OUSKA,
 Presiding.

MR. PRESIDING JUSTICE BURKE delivered the opinion of the court:

This action was brought on a criminal complaint of battery arising from a family quarrel in defendant's apartment on July 8, 1971. Defendant, Douglas Jones was charged with a violation of Ill.Rev.Stat. 1971 ch. 38, par. 12-3 (a)(1) which provides:

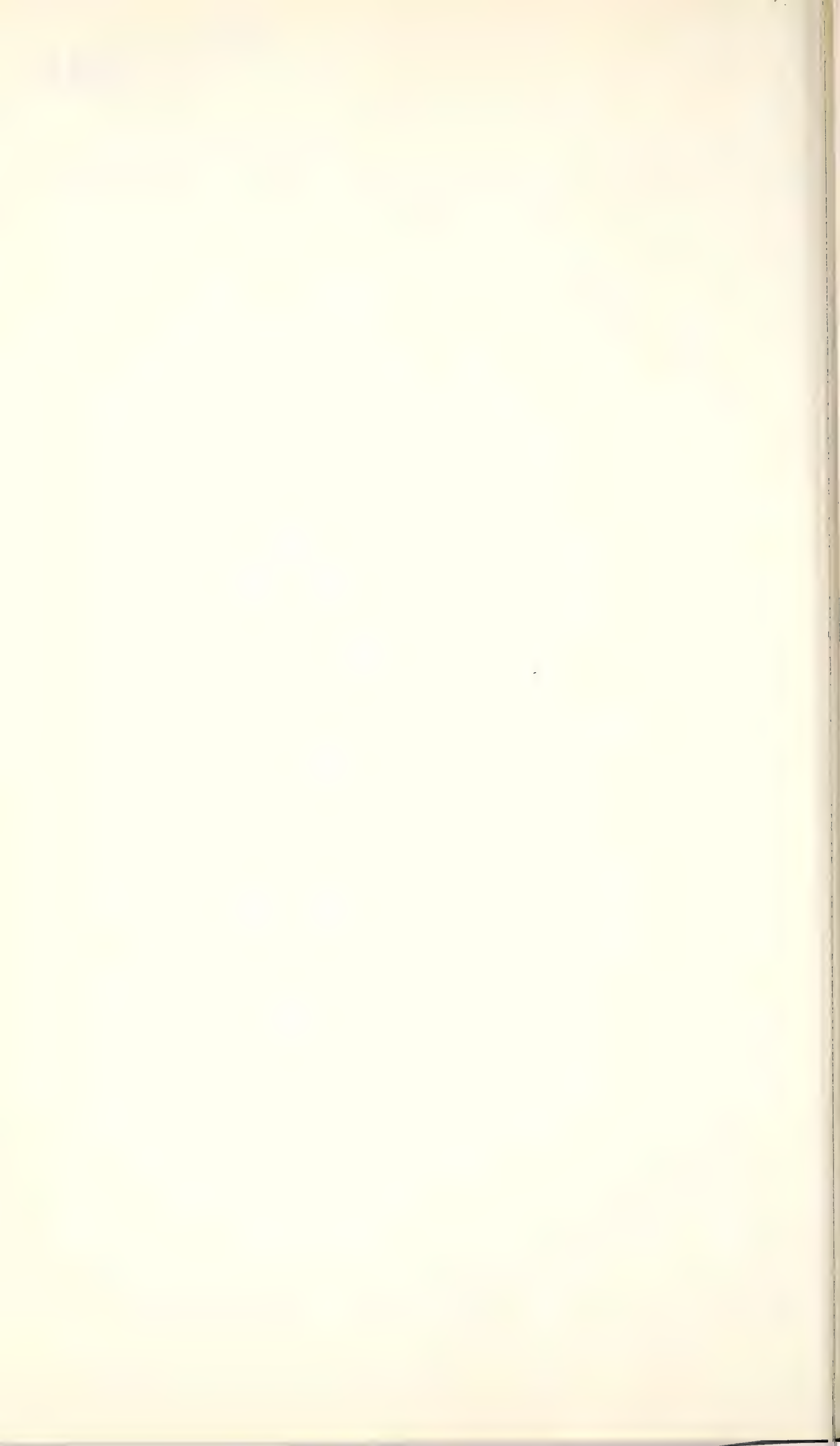
"12-3. Sec. 12-3. Battery] (a) A person commits battery if he intentionally or knowingly without legal justification and by any means. (1) causes bodily harm to an individual..."

Specifically, the complaint alleged that on or about July 8, 1971, Douglas Jones "intentionally and knowingly without legal justification caused bodily harm to Patricia Didur by striking her about the head and body with his hands and fists in violation of ch. 38, Sec. 12-3 (a)(1)."

After a bench trial defendant was found guilty. Defendant's motion for a new trial was denied and he was sentenced to probation for a period of six months. He appeals.

The evidence adduced at the trial is contained in a certified Report of Proceedings which the parties filed pursuant to Supreme Court Rule 323 (c) (Ill.Rev.Stat. 1971, ch. 110A, par. 323 (c)). The People called five witnesses, namely:

Mrs. Patricia Didur, the complaining witness and the defendant's mother-in-law ("Mrs. Didur"); Kathleen Didur Jones, daughter of the complaining witness and wife of the defendant ("Kathleen"); Mrs. Asp, neighbor and a friend of Kathleen ("Mrs. Asp"); Officer McGovern, a police officer on the Rosemont Police Force ("Officer McGovern");



Officer Krumwiede, a police officer on the Rosemont, Illinois Police Force ("Officer Krumwiede").

The complaining witness, Mrs. Didur, testified that she arrived at the defendant's apartment in Rosemont with her son Larry and her daughter Kathleen, and the defendant's daughter at approximately 7:00 o'clock on the evening of July 8, 1971.

Mrs. Didur testified that the defendant was not present at his apartment at the time she arrived and Mrs. Asp did not come to the apartment until some time after the altercation started.

Mrs. Didur testified that "the defendant did not live in the apartment" and that the defendant arrived at the apartment at approximately 7:30 p.m. on July 8, 1971 .

Mrs. Didur further testified that upon arriving at the apartment, the defendant conducted a room-to-room search of the apartment and that, as he walked from his daughter's bedroom into the kitchen, he struck her on either the chest or the shoulder but that she was uncertain as to whether he struck her with his hand or his arm.

Mrs. Didur testified that she attempted to push the defendant into the utility room and lock him in that room. She stated that she, her daughter Kathleen, and her son Larry all attempted to push the utility room door closed against the defendant.

Mrs. Didur testified that when the defendant freed himself from the utility room, he simultaneously held Larry behind the utility room door and repeatedly slammed the utility room door into Larry causing him to become "all black and blue," prevented Kathleen from going to the baby's room, and attacked the complaining witness. Mrs. Didur testified that, as the result of the defendant's actions,



Larry required medical treatment the next day.

Mrs. Didur testified that she did hit the defendant over the head with a coke bottle while he was in the kitchen.

Mrs. Didur was unable to provide any specifics as to how or where the defendant hit her while she was in the kitchen beyond the incident related above concerning the defendant's entry into the kitchen from his daughter's bedroom.

The complaining witness testified that the fight moved from the kitchen into the living room and that, while the parties were in the living room, she kicked the defendant in the groin and knocked him down on top of the stereo phonograph. The complaining witness further testified that she attempted to strike the defendant with a statue while he was holding his infant daughter and that the defendant used his daughter as a shield to ward off her attack. She further testified that the defendant hit her across the forehead with a white statue, breaking the statue and lacerating her forehead.

Mrs. Didur further testified that the altercation lasted approximately twenty minutes during which time she was unable to escape from the defendant and that the altercation terminated simultaneously with the arrival of the police officers. The complaining witness also testified that there was substantial ripping of her clothing above her waist and further testified the upper part of her body was exposed although she was not precise as to the extent she was exposed. On cross-examination, the complaining witness stated that she was unable to remember when she was able to re-robe. The complaining witness testified, as the police arrived, that her clothes were ripped to the waist and she had a laceration on her forehead.

In addition, Mrs. Didur testified that she suffers from sugar diabetes and she acknowledged that on the day of the trial she had several bruises on her legs due to the fact that she bruises easily.



On cross-examination, the complaining witness testified that she did spit on the defendant on the night of the altercation. When defense counsel inquired of her as to whether she had spit in the defendant's face on the evening in question, she responded: "Of course I did, I am a woman." While admitting that she spit on the defendant on the evening in question, the complaining witness could not remember the precise number of times or circumstances under which she spat on the defendant.

Kathleen Didur Jones testified that she arrived with her mother, brother and infant daughter at the defendant's apartment in the late afternoon, that Mrs. Asp came into the apartment during the afternoon and left the apartment sometime during the altercation. She further testified that the defendant lived in the apartment on a full-time basis but that she only lived in the apartment during the "daytime."

Kathleen testified that on July 8, 1971 she had left the apartment for her mother's house after her husband, the defendant, had left for work. She spent the day at her mother's house and had returned to "wash several days' dishes" and that she had put the baby to sleep in her crib prior to the time the alleged altercation took place. She testified that the defendant returned home from work at approximately 7:30 p.m.

Kathleen testified that the defendant, upon arriving home, conducted a search of the apartment. She further testified that she "thought" the defendant struck her mother in the face but did not know whether it was an open or closed fist, sometime after he had entered the kitchen from his daughter's bedroom. Kathleen testified that there was an attempt to lock the defendant in the utility room but that only her mother (the complaining witness, Mrs. Didur) and Larry attempted to hold the utility room door closed.



Kathleen testified that Larry was not injured during the altercation, that he was playing with Mrs. Asp's children in the front room during most of the altercation and that, to the best of her knowledge, he was given no medical treatment the next day.

Kathleen testified that her mother, the complaining witness, was pushed against the wall when the defendant freed himself from the utility room and the complaining witness was trying to pick up a coke bottle at that time. She further testified that Mrs. Didur hit the defendant over the head with the coke bottle and she thought the bottle broke. Kathleen testified "they fought into the living room and picked up two statues." She further testified that her mother was "going to pick up a grey lion statue and hit him over the head." Kathleen also testified that Mrs. Didur did attempt to hit the defendant while the defendant was holding his infant daughter.

Mrs. Asp testified that she had been in the apartment for approximately two hours prior to the time the altercation started and left the apartment in the middle of the altercation shortly after the attempt to lock the defendant in the utility room. Mrs. Asp also testified that both Kathleen and the defendant lived in the apartment on a "full-time basis." She testified that the defendant arrived home at approximately 7:30 p.m. and that he looked throughout the apartment upon his arrival home.

Mrs. Asp testified that she did not see the defendant hit Mrs. Didur as he emerged from his daughter's bedroom. Mrs. Asp testified that there was an attempt to lock the defendant in the utility room but that only Mrs. Didur, the complaining witness, attempted to hold the door closed and Kathleen was standing on the far side of her (Mrs. Asp) from the door. Mrs. Asp testified that the kitchen was



just short of the length of the jury box and that the door to the baby's room was at the opposite end of the kitchen from the door to the utility room.

Mrs. Asp further testified that Larry, the complainant's son, was not injured to her knowledge and that he was playing with the children in the front room during the altercation. Mrs. Asp testified that she left the apartment at approximately the time the attempt was made to lock the defendant in the utility room and was not in the apartment at the time the fight moved in to the living room but as she left the apartment, she saw the defendant strike the complaining witness in the kitchen. On cross-examination, Mrs. Asp could not provide any particulars as to where or how the defendant struck the complaining witness.

Officer McGovern of the Rosemont Police Department testified that when he arrived on the scene, he was met by both the complaining witness and the defendant. That he saw no visible injury to the complaining witness, saw no visible lacerations on the complaining witness and he could not remember seeing any other injuries to the complaining witness. He testified that while there was some blood splattered on the complaining witness' clothes, he was unable to ascertain where the blood came from since there was no apparent wound on the complaining witness' body and that the blood could have come from someone else. He further testified that the complaining witness did have a small rip on the shoulder of her dress exposing her bra strap and that he was uncertain as to whether it was the right or left shoulder that was ripped.

Officer McGovern further testified that he did inspect the premises and it was in a state of disarray. There was considerable broken glass on the floor of the apartment particularly in the



kitchen but that he saw no broken statuary.

Officer McGovern's partner, Officer Krumwiede's testimony was limited to stating that the address at which the incident took place was in Cook County.

The defendant, Douglas Jones, testified that on the evening of July 7, his wife and he had a quarrel but that he felt the quarrel was resolved when he left for work the next morning of July 8, 1971. At approximately 12:00 p.m., on July 8, 1971, he testified that he received a call from his father-in-law during the course of which his father-in-law threatened him.

The defendant further testified that he returned home from work at approximately 7:30 the evening of July 8 and inspected the apartment to make certain that his father-in-law was not lying in wait for him. He encountered his mother-in-law, the complaining witness, in the kitchen and she greeted him by saying, "Hi, wife beater," to which he responded, "Hi, bitch," and then he proceeded into his daughter's bedroom to see if his father-in-law might be in there.

The defendant further testified that as he came out of his daughter's bedroom, he went past the complaining witness who at that time spat in his face and said, "Your father-in-law was going to kick your ass." He continued his investigation of the apartment by opening the door into the utility room, at which point the complaining witness pushed him into the utility room and slammed the door, catching his hand and trapping him in the utility room on the opposite side of the door from the complaining witness.

While his hand was closed in the door, the defendant testified the complaining witness twisted his middle and index fingers while leaning against the door and he could not open the door because of his awkward position, the fact that his hand was trapped in the jamb, and the weight of the complaining witness on the other side.



The defendant testified that while he was trapped in the utility room, he heard the complaining witness state, apparently to Mrs. Asp, "Leave the apartment so he doesn't have any witnesses," and he heard his wife say, "Don't do that; he doesn't deserve it."

The defendant proceeded to testify that when he was finally able to force the door open, the momentum carried the complaining witness to the opposite wall of the kitchen and carried him forward in a semi-stooped position in the same direction, that the complaining witness was holding a coke bottle in her right hand which she used at that time to strike him (the defendant) over the head, and that he struck the complaining witness in an attempt to ward off further blows with the coke bottle and grabbed her wrist in an attempt to get the coke bottle away from her. The defendant testified that, at that time, the complaining witness was still attempting to attack him and that he held her against the refrigerator and repeatedly told her to calm down and she attempted to knee him in the groin. The defendant testified that it was at this point that he told his brother-in-law, Larry, to call the police at which time his brother-in-law left the apartment (there was testimony that the phone in the apartment did not work).

The defendant further testified that, after holding the complaining witness against the refrigerator and asking her to calm down, he walked away from the complaining witness, left the kitchen and entered the front room. He testified that the complaining witness followed him into the front room and said: "You're not going no where," and the defendant responded, "I know, I am going to have the police come and throw you out." The defendant testified that the complaining witness then picked up a child's rocking chair in her hand and waved it at him and that he told the complaining witness to put down the



rocking chair, which she did, but that she immediately picked it up again and, holding it out at arm's length, said, "No, I need it."

The defendant further testified that, at this point in time, his daughter was crying, that he went and picked her up and that the complaining witness then said, "That's not your daughter--she's only your daughter biologically," and then picked up a statue of a cat approximately eighteen inches long and attempted to attack the defendant with the statue while he was holding his infant daughter. The defendant testified that he was finally able to hand his daughter to Kathleen, who took the baby out of the apartment and very shortly thereafter, the police arrived and he went out of the apartment to meet them.

The defendant testified that he had married the complaining witness' daughter approximately two years prior to the incident in question while he was in the Marines; that he had been released from the Marines upon returning from Viet Nam in November of 1970; that his wife had been separated from him since the night of July 8, 1971; that he had not seen his child since that evening and that divorce proceedings were pending.

During cross-examination, the prosecuting attorney inquired as to the reason why the defendant did not request the police to escort him home on the evening of July 8th in light of the fact that his father-in-law had threatened him with physical violence. The defendant stated that as a result of his problems with his in-laws, the police had made several visits to his apartment and the landlord had threatened eviction if any additional visits were made by the police department. The defendant further explained that he had informed his father-in-law that "they could sit down and talk their differences out."



Defendant argues on appeal that the People have failed to prove him guilty beyond a reasonable doubt.

Ill.Rev.Stat. 1971, ch. 38, par. 3-1 provides inter alia that:

"No person shall be convicted of any offense unless his guilt thereof is proved beyond a reasonable doubt."

In People v. Eyre, 83 Ill.App.2d 123, 227 N.E.2d 120, this Court reversed a battery conviction which contains similarities to the present case. In Eyre, the Court found contradictions in the evidence that could not be reconciled merely by deferring to the trial court's assessment of the witness' credibility. In Eyre, as in the present case, the defendant testified that the complainant was the aggressor and struck first. In Eyre, this testimony was supported by a companion of the complainant. In the present case, the complaining witness herself testified as to the acts of aggression she committed against the defendant, and the complaining witness did not adequately rebut the defendant's testimony that he acted in self-defense. And, in Eyre, as in the present case, it was apparently at the defendant's behest that the police were called — by the defendant's wife, in Eyre, and at the defendant's instruction (to Larry, his brother-in-law), in the present case.

In Eyre, this Court summarized its holding by stating, 83 Ill.App. 2d 123, 133-134, 227 N.E.2d 120, 125:

"The evidence in this case, together with the reasonable inferences to be drawn, is so improbable and unsatisfactory as to justify a reasonable doubt of the defendant's guilt."

In the instant case, we are of the opinion that the People failed to prove the defendant guilty beyond a reasonable doubt with respect to two essential elements of the charge.

First, there is doubt as to whether the defendant acted without legal justification, and this doubt cannot be resolved by crediting the complaining witness with superior credibility. It is significant to note that no witness testified to a chronology of events that



controverted or rebutted the defendant's testimony, which was that physical aggression was initiated when the complainant spat on the defendant. Also, the complainant, Mrs. Didur, as well as other prosecution witnesses testified to a remarkable catalog of violent and aggressive acts committed by the complaining witness against the defendant, over a period of many minutes, including spitting, kicking, shoving, attempting to imprison him in a closed room, hitting him with a coke bottle, and trying to strike him with a statue while he was holding his infant daughter.

Secondly, there is doubt as to whether the defendant caused bodily harm to the complaining witness by the blows with which the defendant is charged. The complaining witness' testimony that she suffered a laceration to her forehead was contradicted by the police officer, and uncorroborated by her daughter.

In People v. Semenick, 360 Ill.250, 254, 195 N.E. 671, 672, the Illinois Supreme Court stated:

"While the weight of the evidence is for the court or jury to determine, yet where the verdict or judgment is palpably contrary to the weight of the evidence, or the evidence is so unreasonable, improbable or unsatisfactory as to justify a reasonable doubt of defendant's guilt, it is the duty of this court to reverse the judgment. People v. Holton, 326 Ill.481; People v. Rice, 323 id. 580; People v. Nemes, 347 id.268."

The evidence in the present case is, we believe, so improbable and unsatisfactory as to justify a reasonable doubt as to defendant's guilt. It is unnecessary to discuss the other points of error raised by defendant.

For these reasons the judgment is reversed.

JUDGMENT REVERSED.

EGAN and HALLETT, JJ., concur.



ABST.

57370

PEOPLE OF THE STATE OF ILLINOIS,	)	APPEAL FROM
	)	CIRCUIT COURT
Plaintiff-Appellee,	)	COOK COUNTY.
)	
v.)	
)	
CARL H. SMITH,	)	HONORABLE
	)	JAMES A. GEOCARIS,
Defendant-Appellant.	)	PRESIDING.

* PER CURIAM (FIRST DISTRICT, FIRST DIVISION):

The defendant, Carl H. Smith, was charged with possession of a hypodermic needle, a hypodermic syringe, or other instrument adaptable for the subcutaneous injection of narcotic drugs in violation of Section 22-50 of the Criminal Code. (Ill. Rev. Stat. 1969, ch. 38, par. 22-50.) After a bench trial the defendant was found guilty, fined \$100, and placed on probation for a period of one year.

On May 19, 1971, at about 2:45 P.M. the defendant was sitting in the driver's seat of a parked car at 2320 South Indiana Avenue, Chicago, Illinois, when a police officer saw the defendant throw a hypodermic needle and a hypodermic syringe from the car. The police officer picked up the hypodermic needle and syringe and placed the defendant under arrest.

On cross-examination the police officer testified that he saw the defendant with a needle in his arm, saw him take it out of his arm and throw it out of the car. There was blood in the needle when the police officer recovered it from the ground and there was blood on the defendant's arm.

The defendant testified that he did not have a hypodermic needle in his possession and did not throw a hypodermic needle out of the window of the automobile.

On appeal, the defendant contends that the complaint was fatally defective because he was charged in the disjunctive with the violation of Section 22-50 of the Criminal Code in that he knowingly had in his possession "a hypodermic needle, a hypodermic syringe or other instrument adaptable for the subcutaneous injection of narcotic drugs."



The offense as charged in the complaint is in the language of the statute. (People v. Brosnan (1935), 361 Ill. 545, 546, 198 N.E. 708.) The word "or" is a fatal defect only when its use renders the statement of the offense uncertain. (People v. Brosnan (1935), 361 Ill. 545, 546, 198 N.E. 708; People v. Farrell (1932), 349 Ill. 129, 132, 181 N.E. 703; People v. Rauschenberg (1961), 29 Ill.App.2d 293, 173 N.E.2d 6, affirmed 23 Ill.2d 511, 179 N.E.2d 13.) The fact that certain words, intimately associated in their meaning, are stated disjunctively, does not render a complaint uncertain. (People v. Rosenfeld (1962), 25 Ill.2d 473, 475, 185 N.E.2d 236.) In the case at bar the statutory words "hypodermic needle, hypodermic syringe or any instrument for the subcutaneous injection of narcotic drugs" are intimately associated in their meaning and the fact that the words are stated disjunctively does not render the complaint uncertain.

In State v. Kelly (1972), 13 N.C.App. 588, 186 S.E.2d 631, the provisions of the statute were very similar to those contained in Section 22-50 and provided that "no person*** shall at any time have or possess a hypodermic syringe or needle or any instrument or implement adapted for the use of habit-forming drugs by subcutaneous injections." The court held that an indictment charging illegal possession of a "hypodermic syringe or needle" was valid, stating, at page 633:

"The statute under which defendant was charged sets forth only one offense; that is, the unlawful possession of an instrument adapted for the use of habit-forming drugs. The offense is proven when it is shown that a defendant had within his possession, under circumstances described in the statute, one or more hypodermic syringes, needles, or other instruments or implements adapted for the use of habit-forming drugs, or any combination thereof. The fact the indictment here charges hypodermic syringe or needle creates no uncertainty as to the offense. Apparently the indictment was treated as charging the possession of both hypodermic needle and syringe for the jury verdict found defendant guilty of possessing both."



In the case at bar the word "or" as used in Section 22-50 of the Criminal Code and in the complaint, did not render the statement of the offense uncertain and, therefore, the complaint was not fatally defective. The record discloses no confusion or prejudice for the defendant as to the nature of the crime charged, or as to the methods he must use properly to defend his case. People v. Rosenfeld (1962), 25 Ill.2d 473, 476, 185 N.E.2d 236.

Defendant relies upon the case of People v. Heard (1970), 47 Ill.2d 501, 266 N.E.2d 340, where the complaint, following the language of the statute, charged in the disjunctive, that the defendants "set up a policy game or promoted a policy game or sold tickets" for a lottery or sold or offered to sell or transferred or knowingly possessed a policy ticket or other similar device; "to wit: policy results tickets, policy bet writings and other related gambling policy paraphernalia." The court held the complaint fatally defective because the statute named disparate and alternative acts, any one of which might constitute an offense. The Heard case is distinguishable from the facts in the case at bar because here the statute provided that the defendant was guilty if he had "in his possession a hypodermic syringe, hypodermic needle, or any instrument adapted for the use of narcotic drugs by subcutaneous injection." These words are intimately associated in their meaning, are adapted for the use of narcotic drugs and, therefore, the fact that they are stated disjunctively does not render the complaint uncertain or fatally defective. People v. Rosenfeld (1962), 25 Ill.2d 473, 475, 185 N.E.2d 236.

Likewise, the recent case of People v. Woolfolk, Ill.App. Court, 1st. District, 5th Division, No. 56543, May Term, is distinguishable from the facts in the case at bar. There the court held that an indictment which charged that the defendants



knowingly set up, promoted, sold, offered to sell, possessed, and transferred policy tickets and other similar devices was fatally defective because the indictment "did not sufficiently notify the defendants of the crime imputed to them." The facts in the case at bar are not analogous to those in the Woolfolk case.

The defendant also argues that because the complaint is ambiguous and uncertain it creates the possibility of double jeopardy. In the case at bar, the complaint adequately informed the defendant of the crime charged so as to enable him to prepare his defense and was sufficient to obviate any danger of double jeopardy. People v. Rosenfeld (1962), 25 Ill.2d 473, 476, 185 N.E.2d 236; People v. Beeftink (1961), 21 Ill.2d 282, 292, 171 N.E.2d 632.

The judgment of the trial court is affirmed.

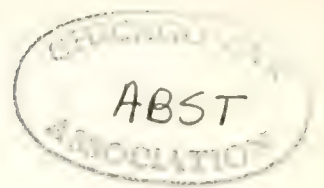
JUDGMENT AFFIRMED.

*Mr. Presiding Justice Burke did not participate.



58139

PEOPLE OF THE STATE OF ILLINOIS,)	APPEAL FROM
Plaintiff-Appellee,)	
vs.)	CIRCUIT COURT,
	COOK COUNTY.
RUDOLPH LUCIEN,)	
Defendant-Appellant.)	HON. MINOR K. WILSON, Presiding.



MR. PRESIDING JUSTICE BURKE delivered the opinion of the court:

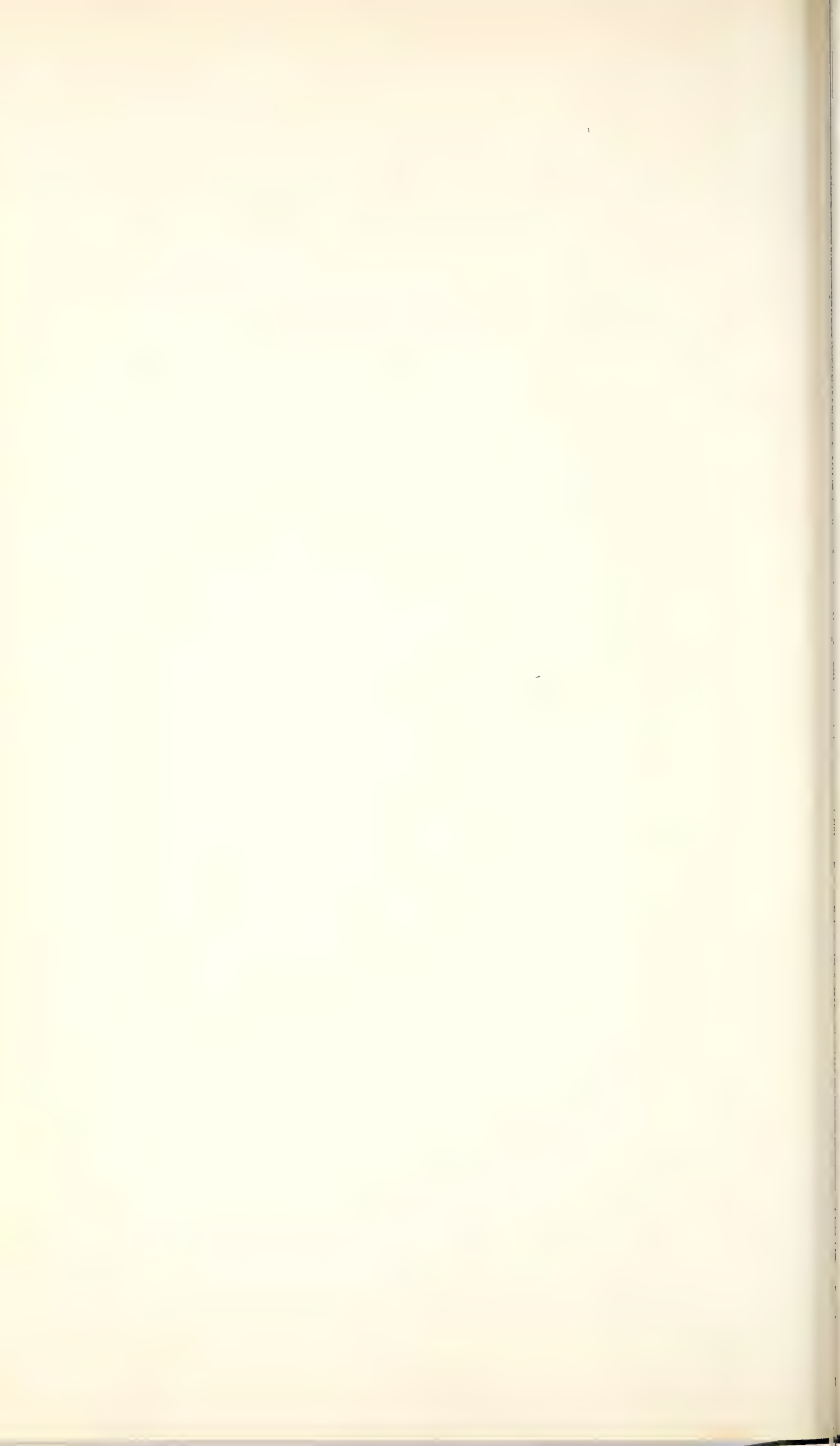
The defendant was found guilty in a jury trial on two counts of attempt murder, two counts of aggravated battery and one count of attempt armed robbery. He was sentenced to ten to twenty years on each of the attempt murder convictions, and five to fourteen years on the attempt armed robbery charge, all sentences to run concurrently. No sentence was imposed on the aggravated battery counts. The defendant appealed to the Supreme Court, which transferred the cause. The defendant asserts that prejudicial evidence and prosecutorial misconduct denied him a fair trial, that the identification testimony was insufficient to support a conviction, that his pro se defense left him inadequately represented by counsel, and that the sentences imposed were excessive.

On September 5, 1969, Valentina Dailidka, owner of a bakery at 2450 West 59th Street in Chicago, Illinois, and Victoria Benesius, her employee, were working in the bakery. Just before 11:00 A.M., a man entered the store and made a purchase. Mrs. Benesius waited on him. He left but returned about fifteen minutes later and placed another order. This time Mrs. Dailidka waited on him. When she had prepared his purchase, she turned to find him pointing a gun at her and announcing that it was a hold up. Mrs. Dailidka grabbed a trash can and threw it at the man. She retreated to the rear doorway, and he backed away from the can. She heard a shot and knelt down. While she was kneeling, she saw the man shoot at her and

felt the bullet strike her in the chest. She heard another shot, and, when she looked up, the man had left. She discovered Mrs. Benesius had also been shot. Mrs. Dailidka called the police. Mrs. Benesius testified that after being shot she observed the man through a glass display case as he backed out of the store.

The two women were taken to Holy Cross Hospital for treatment. Later that day each was shown several photographs of individuals, none of whom they could identify as their assailant. On September 7, 1969, the police showed each woman, out of the presence of the other, several group photographs, from which they identified the photograph of the defendant. An arrest warrant was issued for the defendant. He was not apprehended until May 28, 1970, in New York City. On that date Mrs. Benesius and Mrs. Dailidka were called to the police station to view a lineup, and each, independently of the other, identified Rudolph Lucien as the attacker.

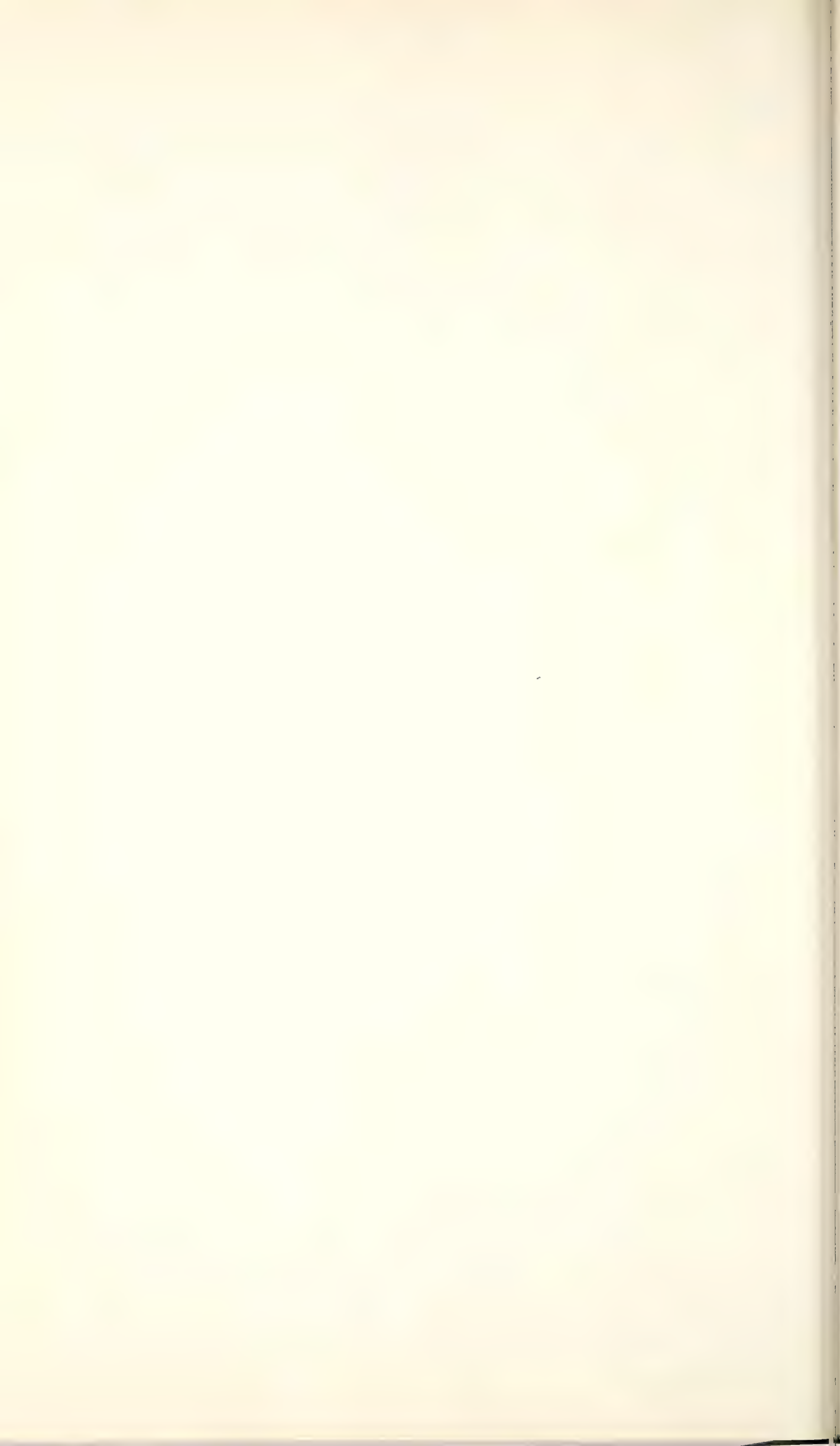
The defendant presented an alibi defense that he was in New York City at the time of the incident. His principal witness was Miss Donna Roberts, who testified that she spent the entire day of September 5, 1969, with the defendant in New York City, where his father was hospitalized. In rebuttal, the State offered testimony by Patrick Baio that he saw the defendant on September 5, 1969, leaving a store in the general area of the crime scene, that the store manager asked Baio to help him chase the defendant, which they did. They saw the defendant enter a car and drive away, and Baio recorded the license number as "PN-9090." The State then offered a certified copy of an application for Illinois title in the name of the defendant for a 1965 Cadillac, showing that replacement license plates were issued for that car and were numbered PY-9090. The defendant's brother-in-law testified that the car was junked before the date of the incident.



The defendant contends that evidence that he was apprised of his Constitutional rights was improperly admitted. Since such evidence should only be admitted if relevant or impeaching, the defendant argues that its admission was improper and prejudicial to his case. The defendant failed to raise an objection to the admission of the evidence now challenged. Ordinarily, this would preclude the defendant from raising the point now. (People v. Trefonas, 9 Ill.2d 92, 136 N.E.2d 817.) If the evidence not objected to is so prejudicial as to deny the defendant a fair trial, this court may review the question of its admissibility. People v. Wright, 65 Ill.App.2d 23, 212 N.E.2d 126.

The question, then, is whether the recital of the Constitutional warnings raises an inference that the defendant chose to stand on his right to remain silent. We find that it does not. The instant case is not one where the defendant refused to answer questions after being accused. (Walker v. United States (5th cir.1968), 404 F.2d 900.) Nor does it involve testimony that the defendant refused to answer questions by police officers before trial (People v. Lewerenz, 24 Ill.2d 295, 181 N.E.2d 99), or questions as to whether he revealed any defense to his actions at the time of arrest. (Fowle v. United States (9th cir. 1969), 410 F.2d 48.) Nor does it involve the extensive comment on the defendant's silence, found prejudicial by the United States Supreme Court. (Griffin v. California, 380 U.S. 609, 14 L.Ed.2d 106, 85 S. Ct. 1229).

The defendant's contention that the State had no legitimate reason for introducing testimony that the warnings were given is belied by the record. At a hearing in chambers, the State indicated that this testimony was a prelude to introduction of statements made by the defendant at the time of his arrest. When the parties returned to the presence of the jury, however, this line of questioning was abandoned.



The defendant's next argument is that the testimony of Patrick Baio should not have been admitted since it contained information linking the defendant with another crime. No objection was made to the introduction of this testimony although the defendant did object to the testimony on the ground that his name was not on the list of witnesses provided to the defendant. Since Baio was a rebuttal witness, this objection was properly overruled. The defendant also objected to the witness' identifying him as the man he saw leaving the store on September 5, 1969, but he failed to state the grounds for his objection. This, of course, raises only the question of relevancy. (Calumet, Etc. Dock Co. v. Morawetz, 195 Ill. 398, 63 N.E.165.) The testimony was relevant.

Assuming a proper objection we would find no reversible error. The standard for review in this situation has been announced by the Illinois Supreme Court:

"The general rule, of course, is that evidence of commission of other crimes by an accused, in addition to that for which he is on trial, is inadmissible unless its relevancy in placing a defendant in proximity to the time and place, aiding or establishing identity, or tending to prove design, motive or knowledge is so closely connected with the main issue as to justify admission." (People v. Cage, 34 Ill.2d 530, 533, 216 N.E.2d 805, 806.)

Applying this standard to the situation before us, the trial judge properly admitted the testimony which placed the defendant in the vicinity of the place of the crimes of which he was accused. It was introduced to rebut the alibi the defendant asserted. The criteria for admission were satisfied. The cases upon which the defendant relies are distinguishable. In the first of these, the witness testified in extensive detail as to the crime which she witnessed. In reversing the conviction, the court said:

"Though her testimony that the defendant was in the grocery store at approximately 11:40 that morning and again shortly after noon was proper since it did rebut his alibi, the

admission into evidence of that portion of the witness' testimony relating the details of the defendant's alleged participation in a crime separate and distinct from that for which he was being tried was prejudicial error." (People v. Fuerback, 66 Ill.App.2d 452, 455, 214 N.E.2d 330, 331.)

In the case before us, the State carefully limited the testimony of the rebuttal witness to the circumstances surrounding his encounter with the defendant.

In the other case cited by defendant, the challenged testimony could not meet the admissibility test. The testimony therein concerned the defendant's appearance in the witnesses' stores in the company of persons who were implicated in a series of robberies in the area. The State was attempting to show a conspiracy to rob the stores in the neighborhood, but the testimony merely placed the defendant in stores with persons he denied knowing. The Supreme Court held that the probative value of such testimony, implying that the defendant was involved in robberies subsequent to the one for which he was charged, was not outweighed by the prejudicial effect of such testimony. (People v. Cage, 34 Ill.2d 530, 216 N.E.2d 805.) That is not the case before us. The testimony here was directly related to the defendant's commission of the crimes of which he was accused. It placed him in the vicinity of the situs of the crimes, rebutting his defense that he was not in the city at the time of the crimes. The probative value of this evidence far outweighed the prejudicial effect, if any, of its admission. See also People v. Botulinski, 383 Ill.608, 50 N.E.2d 716.

The defendant's next argument is that comments by the prosecutor denied him a fair trial. No objection was raised to any of the three instances of alleged improper comment. This would normally preclude review, unless the admission of the statements was so prejudicial as to deny the defendant a fair trial. People v. Hampton, 44 Ill.2d 41, 253 N.E.2d 385; People v. George, 49 Ill.2d 372, 274 N.E.2d 26.

The first instance concerns the statement in closing argument that



the prosecutor "vouched" for the credibility of the State's witnesses. The United States Supreme Court has faced this precise issue. The court said:

"Petitioner Lawn also contends that a statement made by the Government's attorney in his closing summation to the jury, saying, in pertinent part, 'We vouch for [Roth and Lubben] because we think they are telling the truth,' deprived him of a fair trial. No objection was made to the statement at the trial. The Government's attorney did not say nor insinuate that the statement was based on personal knowledge or on anything other than the testimony of those witnesses given before the jury, and therefore it was not improper." (Lawn v. United States, 355 U.S. 339, 359-60 n.15, 2 L.Ed. 2d 321, 335 n.15, 78 S.Ct. 311, 323 n.15.)

Although the court went on to add that the defense had invited such remarks and that the trial judge had admonished the jury to scrutinize the testimony of Roth and Lubben as accomplices, the disposition of the contention turned on the reasoning quoted above. It is this rule which must govern our decision, and we find that the prosecutor's statement did not prejudice the defendant's case. As in Lawn, the prosecutor did not imply that his "vouching" for the witnesses' testimony was based on anything outside the knowledge of the jury. We do not hold, as have courts in other jurisdictions, that such statements prejudice the defendant's right to a fair trial even without any inference that other information is available to the prosecutor. (See for example, Greenberg v. United States (1st cir., 1960), 280 F.2d 472.)

The second allegation of prosecutorial misconduct concerns the prosecutor's closing statement, in which he mentioned, after stating that he vouched for the State's witnesses, that only Mr. Lucien vouched for his alibi witness, Miss Donna Roberts. The defendant contends that this amounts to a charge that the defendant was a liar, a charge evidencing the prosecutor's desire to influence the jury unfairly. The case on which the defendant relies contains the following discussion:



"The record contains remarks which no State's attorney should use in the argument of a case, such as charging counsel for plaintiff in error with lying in his argument. Such statements do not indicate care on the part of the State's attorney to avoid improper influence of the jury, but rather tend to show a desire to procure an unfair, and therefore prejudicial, influence with the jury. Such conduct has always been condemned." (People v. Savage, 325 Ill. 313, 319, 156 N.E. 310, 313.)

As can be seen, the case cited refers to an actual charge of lying. It would require a strained construction indeed to find that the statement in the instant case labelled the defendant a liar. We will not hold that the jury was or could have been unfairly influenced by a statement that demands such an imaginative reading to be prejudicial.

The third statement to which the defendant refers concerns the prosecutor's interrogation of the two complaining witnesses. The defendant contends that the prosecutor deliberately evoked from these witnesses the information that they had families of their own. There is no evidence that the testimony was inflammatory or that it prejudiced the defendant's case. It was not mentioned in argument and was treated as incidental information. The cases cited by the defendant involve admission of prejudicial testimony. (See People v. Galloway, 7 Ill.2d 527, 131 N.E.2d 474; People v. Dukes, 12 Ill.2d 334, 146 N.E.2d 14; People v. Gregory, 22 Ill.2d 601, 177 N.E.2d 120.)

The defendant next challenges his identification by the two complaining witnesses. He first asserts that the descriptions given to the police by the witnesses right after they were shot were vague and, as eyewitness recollections, unreliable. We find no basis in the record for this contention. The witnesses in this case described their assailant as a black man with brown complexion, about six feet tall, about twenty years old, of slender build, handsome, and with a bushy Afro haircut. His dress was recalled



as casual, slacks and print shirt. This description is relatively comprehensive and certainly not vague. (Compare People v. Kincy, 72 Ill.App.2d 419, 219 N.E.2d 662; People v. Magadanz, 126 Ill.App.2d 335, 261 N.E.2d 703.) The witnesses in the instant case had ample opportunity to observe the defendant at close range on two occasions in the bakery, for periods of several minutes each time.

The defendant asserts that the lineup in which he was identified by each witness independently of the other was suggestive, because the witnesses knew his name prior to viewing him, knew he would be in the lineup, and had seen his photograph prior to the lineup. The record does not verify the contentions that the witnesses knew the defendant's name or that he would be in the lineup prior to viewing him. If they had, we would not find the viewing prejudicial on that basis. The defendant must show, in the totality of the circumstances, that his identification was so lacking in fundamental fairness as to deprive him of due process of law, in order to compel reversal of his conviction. (People v. Tucker, 3 Ill.App.3d 273, 278 N.E.2d 141.) This he has failed to do.

As to the effect of the prior photographic identification on the lineup, we must reject the defendant's contention that reversal is required. The United States Supreme Court, in a case similar on its facts to this one, found that the defendant was not prejudiced by the procedure of showing photographs to witnesses shortly after a crime. The Court held that convictions based on eyewitness identification at trial after pre-trial identification from photographs will not be overturned unless the photographic identification procedure was so suggestive that misidentification was likely to result. (Simmons v. United States, 390 U.S. 377, 19 L.Ed. 2d 1247, 88 S.Ct. 967.) The court noted that each case must be decided on its facts.



On the facts presented we find no reason to reverse the trial court. The witnesses were shown several photographs while outside the presence of each other. They were given no prompting by the police as to their choice of the defendant from among the subjects portrayed. The photographic identification procedure was not suggestive.

The defendant maintains that his pro se representation prevented him from receiving the effective representation of counsel. Essentially, this argument is that hindsight reveals that the defendant might have been better represented by counsel other than himself. The fact remains, however, that the defendant knowingly and voluntarily waived his right to counsel and chose to defend himself. Having made his choice, the defendant cannot now argue that, since he erred, we must reverse his convictions. (People v. Morris, 43 Ill.2d 124, 251 N.E.2d 202.) Moreover, the defendant had throughout the proceedings the services of a public defender who assisted him both within and without the courtroom. The trial judge granted the defendant considerable leeway.

The defendant raises one more point in this contention of inadequate representation; that is, that he was denied access to the "rap sheet" at the hearing in aggravation and mitigation. Since the contents were discussed at the hearing, and the defendant had an opportunity to counter the State's allegations of his past criminal activity, we do not find prejudicial error in his lack of access to the document itself, which was not introduced.

Finally, defendant insists that the sentences are excessive. He relies principally on the fact that since his convictions, Illinois has put in force the Uniform Code of Corrections, which

provides for minimum and maximum sentences, in many cases lighter than those formerly set by statute. It has been held that if the sentences imposed under the prior law would be lighter under this new law, the defendant may take advantage of its passage, provided his rights to appeal have not yet been exhausted. People v. Harvey, 53 Ill.2d 585, 294 N.E.2d 269.

With respect to the sentence for attempt armed robbery, the defendant argues that since the sentence is now restricted to that for a Class 3 felony (Ill.Rev.Stat., 1972 Supp., ch.38, par. 8-4(c)(3)), his sentence should be reduced. The sentence of imprisonment for a Class 3 felony is a range of one to ten years (Ill.Rev.Stat., 1972 Supp., ch.38, par. 1005-8-1(b)(4)), the minimum sentence not to be greater than one-third of the maximum term set by the court. (Ill.Rev.Stat., 1972 Supp., ch.38, par. 1005-8-1(c)(4).) Thus, the defendant's sentence of five to fourteen years is excessive. We shall conform the sentence to the statute by reducing the maximum term to ten years. The minimum sentence must then be reduced to three years and four months.

With respect to the sentences for attempt murder, the defendant argues that since the crime is classified as a Class 1 felony (Ill.Rev.Stat., 1972 Supp., ch. 38, par.8-4(c)(1)), the minimum sentences should be reduced to the now statutory minimum of four years. The law reads:

"(b) The maximum term shall be set according to the following limitations:

* * *

(2) for a Class 1 felony, the maximum term shall be any term in excess of 4 years;

* * *

(c) The minimum term shall be set according to the following limitations:

* * *

(2) for a Class 1 felony, the minimum term shall be 4 years unless the court, having regard to the nature and circumstances of the offense and the history and character of the defendant, sets a higher minimum term;..."

(Ill.Rev.Stat., 1972 Supp., ch.38, par. 1005-8-1.)

Thus, the trial court is still empowered to set a minimum term higher than the statutory minimum if, after examination of the circumstances and the defendant's background, it is determined that such a higher minimum is warranted. Since the court already held a hearing in aggravation and mitigation, and the sentences set by the court are still within the range permitted by statute, we have no reason to alter the judge's determination. (People v. Taylor, 33 Ill.2d 417, 211 N.E.2d 673.) The facts disclose ample justification for a higher minimum in this case. The sentences for attempt murder will not be disturbed.

For these reasons the judgment is affirmed as modified.

JUDGMENT AFFIRMED AS MODIFIED.

GOLDBERG and EGAN, JJ., concur.

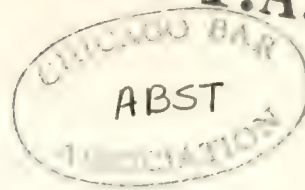
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14 I.A.³ 290



NO. 56941

PEOPLE OF THE STATE OF ILLINOIS,)	APPEAL FROM
)	CIRCUIT COURT
Respondent-Appellee,	)	COOK COUNTY
)	
vs.)	
)	
WILLIE RUTLEDGE,	)	HONORABLE
	)	ROBERT J. COLLINS,
Petitioner-Appellant.	)	PRESIDING.

MR. JUSTICE LEIGHTON delivered the opinion of the court:

This is an appeal from the judgment entered in a post-conviction proceeding brought by appellant Willie Rutledge. The issue is whether the trial court erred in dismissing his petition without granting him an evidentiary hearing. The material facts are not disputed.

On April 2, 1969, after a trial by jury, appellant was convicted of armed robbery and sentenced to 8 to 15 years. He appealed to this court and while the appeal was pending, he filed a pro se petition under the provisions of the Illinois Post-Conviction Hearing Act.^{1/} An attorney was appointed to represent him. Thereafter, an amended petition was filed but was dismissed December 7, 1971, on motion of the State. We affirmed his conviction in the principal case on March 24, 1972. See People v. Norfleet, 4 Ill. App. 3d 758, 281 N.E. 2d 761.

In this appeal, appellant's only contention is that the trial court should have granted an evidentiary hearing of his amended post-conviction petition in order to determine whether he was entitled to a severance from the trial in which he and his co-defendants were convicted. Appellant

1/ Ill. Rev. Stat. 1969, ch. 38, par. 122-1.

\$122.1. Petition in the trial court

Any person imprisoned in the penitentiary who asserts that in the proceedings which resulted in his conviction there was a substantial denial of his rights under the Constitution of the United States or of the State of Illinois or both may institute a proceeding under this article. * * *



argues that he was not identified at the lineup prior to his trial. Instead, he was identified in court with his co-defendants present, a fact that made the identification suggestive and mandated, as a matter of due process, a severance on his behalf.

To require an evidentiary hearing, a post-conviction petition by its allegations, must make a substantial showing that the petitioner's constitutional rights were violated at his trial. (People v. Brown, 41 Ill. 2d 503, 244 N.E. 2d 159.) With regard to a severance, a defendant in a criminal case must demonstrate, prior to his trial, how he will be prejudiced by a joint trial. (People v. Rhodes, 41 Ill. 2d 494, 244 N.E. 2d 145.) The failure to move for a severance forecloses any claim of prejudice resulting from a joint trial. People v. Carver, 77 Ill. App. 2d 247, 222 N.E. 2d 17.

The record before us reveals that appellant did not move for a severance prior to his trial. Therefore, he cannot argue that he was prejudiced by the trial court's failure to grant him a severance. (People v. Ramey, 115 Ill. App. 2d 431, 253 N.E. 2d 688.) This failure appears in the allegations of appellant's amended post-conviction petition. This being the case, appellant's amended petition failed to raise a constitutional question and was properly dismissed without an evidentiary hearing. The judgment is affirmed.

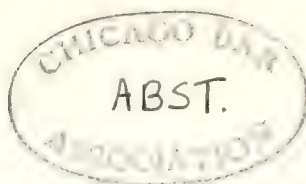
Affirmed.

Stamos, P.J. and Downing, J., Concur.

Publish abstract only.



57819



ANN E. GLENDINNING, Administrator of)	
the Estate of KEN ADAM GLENDINNING,	)	APPEAL FROM THE
deceased,	)	CIRCUIT COURT OF
Plaintiff-Appellant,	)	COOK COUNTY
)	
v.	)	HONORABLE
	)	WILLIAM M. BARTH,
ARTHUR FORMILLER,	)	JUDGE PRESIDING.
Defendant-Appellee.)	

MR. JUSTICE DOWNING delivered the opinion of the court:

Ann E. Glendinning brought an action, as administrator, to recover damages for the wrongful death of her 14-year-old son¹ as a result of defendant's alleged negligent operation of his automobile. The jury returned a verdict for the defendant and, by an affirmative answer to a special interrogatory, found the decedent guilty of negligence which was a proximate cause of his death. Plaintiff now appeals from that judgment presenting the following issues to this court:

1. Whether the verdict of the jury was against the manifest weight of the evidence?
2. Whether the trial court erred in refusing to give the jury plaintiff's tendered instruction regarding the pedestrian's statutory right-of-way when in a crosswalk?
3. Whether statements made by defense counsel referring to a "not guilty" verdict of the coroner's jury and plaintiff's failure to waive the Dead Man's Statute constituted prejudicial and reversible error?

The accident giving rise to this cause of action took place at the point where Luna Avenue joins 79th Street in the Village of South Stickney. 79th Street runs in an east-west

1/ Ken Glendinning was born April 18, 1953 and died March 11, 1968.



direction with two lanes going in each direction divided by a median strip, while Luna begins at 79th Street and runs northward forming a "T" intersection. There are no paved sidewalks on the north or south sides of 79th Street or on the east and west sides of Luna near 79th, and there are no painted crosswalk lines at that intersection. The west end of the median strip (east of Luna) was eight to ten feet east of the east curb line of Luna. The weather was clear although it had rained that day and the pavement was wet. At the time of the accident the area was dark, the only source of light being a street lamp on the northwest corner of the intersection. The children were wearing dark navy blue and black clothing.

The major factual dispute in this case centers around whether there was a crosswalk at the intersection of Luna and 79th Street and, if so, whether the decedent was in that crosswalk when defendant's car struck him. Each side presented occurrence witnesses to testify as to the point at which the decedent and Ms. Kurkowski crossed 79th Street.

Shirley Kurkowski testified that on March 9, 1968 decedent, Ken Glendinning, accompanied her to a teenage coffee house located on the south side of 79th Street, approximately one-half block west of Luna. They left the coffee house at around 8:40 P.M., walked east to the curb of 79th Street at Luna; that, at a point a few feet east of [and across from] the east curb line of Luna and a few feet west of the median, as they started across 79th, Ken was to her left, she looked to the west for eastbound traffic and saw nothing coming, they then walked directly north; that about five feet (maybe less) short of the median, on the inside eastbound traffic lane closest to the median, sensing danger, although not seeing defendant's car, she started running and next recalled being in the hospital. She further testified she never saw car headlights and does not



remember hearing brakes. She identified a point on a photograph where she and Ken started to cross 79th, which point was just west of the end of the median strip east of Luna.

Plaintiff also presented two other occurrence witnesses. One testified he was in front of the coffee house about 100 feet from the accident, saw the two victims leave the coffee house, saw them step off the curb directly opposite Luna, heard the automobile skid, that the left front of defendant's car hit the victims three or four feet away from the median, that they were about ten feet east of median strip, that the car had no headlights. The other occurrence witness testified he was out in front of the coffee house, about 100 feet from the accident, and saw the victims proceed east, to a little bit east of the median strip east of Luna, that defendant's car was in the left-hand lane of the eastbound traffic, heard tires screeching, that the left front of the car struck the victims, that he next saw Ken's body a foot or so from the median strip, that, when he examined the car after the accident, the car had no headlights but its parking lights were on.

Daniel Rewers, a Cook County Sheriff's police investigator, testified on behalf of defendant. On the night of the accident he had been observing the teen coffee shop and was parked diagonally across 79th Street, about 75 to 80 feet east of Luna, that he saw the victims in a group of kids about 125 to 150 feet east of the coffee shop, that there were groups of children near the coffee shop, that defendant's car with headlights, was in the curb lane heading eastbound, about 15 or 20 feet from the victims as they came off the curb, the car was traveling approximately 35 miles an hour, that the victims were running and about five feet from the curb when hit, that at the time of the accident he had commenced driving west on 79th Street intending to go to the coffee shop, that after the victims were hit one child was lying directly in line with the east curb of Luna and the other to the west of it.



Suffice it to say that the disagreement in the witnesses' testimony is sufficient to preclude this court from declaring that the jury's verdict was against the manifest weight of the evidence. Accordingly, it was important for the court to properly instruct the jury on the respective theories of the case.

Plaintiff contends the decedent was in a crosswalk at the time of the accident and charged the defendant with violation of section 11-1002 of the Illinois Vehicle Code (Ill.Rev.Stat. 1971, ch. 95-1/2, par. 11-1002) in her amended complaint. She now claims error in the trial court's refusal to give an instruction (numbered 13) to the jury in the words of the statute, to wit:

There was in force in the State of Illinois at the time of the occurrence in question a certain Statute which provided that:

'When traffic control signals are not in place or not in operation, the driver of a vehicle shall yield the right-of-way, slowing down or stopping if need be to so yield, to a pedestrian crossing the roadway within a crosswalk when the pedestrian is up on the half of the roadway upon which the vehicle is traveling, or when the pedestrian is approaching so closely from the opposite half of the roadway as to be in danger.'

If you decide that the defendant violated the Statute on the occasion in question, then you may consider that fact, together with all the other facts and circumstances in evidence in determining whether or not the defendant was negligent before and at the time of the occurrence.

It is plaintiff's position that, by refusing to give this instruction to the jury, the court effectively prevented the jury from considering plaintiff's theory of the case. This instruction follows the form suggested (no. 60.01) in Illinois Pattern Jury Instructions 2d.

Defendant maintains the instruction was properly refused. He contends that there were no crosswalks at 79th Street and Luna as a matter of law, and assuming arguendo that there is a crosswalk, there is no evidence that decedent was within it.



The first argument ignores the statutory definitions of intersection, crosswalk, and sidewalk. These definitions were submitted to the jury in lieu of plaintiff's instruction 13 and provide:

Intersection. The area embraced within the prolongation or connection of the lateral curb lines, or, if none, then the lateral boundary lines of the roadways of two highways which join one another at, or approximately at, right angles or the area within which vehicles traveling upon different roadways joining at any other angle may come in conflict. (Ill.Rev.Stat. 1971, ch. 95-1/2, par. 1-132.)

Cross walk. (a) That part of a roadway at an intersection included within the connections of the lateral lines of the sidewalks on opposite sides of the highway measured from the curbs or, in the absence of curbs, from the edges of the traversable roadway;

(b) any portion of a roadway at an intersection or elsewhere distinctly indicated for pedestrian crossing by lines or other markings on the surface placed in accordance with the provisions in the Manual adopted by the Department as authorized in Section 11-301 of this Act. (Ill. Rev.Stat. 1971, ch. 95-1/2, par. 1-113.)

Sidewalk. That portion of a street between the curb lines, or the lateral lines of a roadway, and the adjacent property lines, intended for use of pedestrians. (Ill.Rev.Stat. 1971, ch. 95-1/2, par. 1-188.)

In Stine v. Union Electric Co. (1940), 305 Ill.App. 37, 26 N.E.2d 433, the defendant similarly argued that the absence of improved sidewalks precluded the existence of an unmarked crosswalk. The Appellate Court disagreed and, interpreting the statutory predecessor of the Illinois Vehicle Code, stated:

[The statutory definition of sidewalk] does not provide or require that the strip intended for sidewalk purposes be actually improved with or used as a sidewalk, and [the statutory definition of crosswalk] does not require that the cross walk be actually improved or designated in any particular way. (305 Ill.App. at 41.)

Clearly then an unmarked crosswalk may exist at an intersection where that portion of the street which corresponds to the statutory definition of a sidewalk is unimproved. Any other interpretation would give rise to the absurd result that, while pedestrians in areas having paved sidewalks are protected by the

statutory right-of-way in a crosswalk, pedestrians in an area not having improved sidewalks are denied such protection when crossing an intersection.

Defendant's contention that there is no evidence to show that decedent was within a crosswalk is without merit since the record contains the testimony of plaintiff's witness Shirley Kurkowski and a photographic exhibit that, if the jury believed, would place the decedent within the unmarked crosswalk at the time of the accident.

It is elementary that a party has a right to have the jury properly instructed as to his theories of recovery (Blanchard v. Lewis (1953), 414 Ill. 515, 523, 112 N.E.2d 167; Barango v. Hedstrom Coal Co. et al. (1956), 12 Ill.App.2d 118, 132, 138 N.E. 2d 829; Sims v. Chicago Transit Authority (1955), 7 Ill.App.2d 21, 30, 129 N.E.2d 23; Budovic v. Eschbach (1953), 349 Ill.App. 163, 168, 110 N.E.2d 477.) In the present case plaintiff charged the defendant with violation of a statute that required him to yield the right-of-way to pedestrians within a crosswalk. Had the jury found that the defendant did violate the statute, such would have constituted prima facie evidence of negligence (Ney v. Yellow Cab Co. (1954), 2 Ill.2d 74, 78-79, 117 N.E.2d 74.) Nonetheless, even though the jury could have found from the statutory definitions before it that there was an unmarked crosswalk at the intersection, and, even though it could have found from the testimony of the occurrence witnesses that the decedent was within the crosswalk, the jury was not informed that in such a situation the decedent would have the right-of-way and the defendant the duty to yield the right-of-way. Thus had the statute been before the jury in their deliberations, it is open to question whether they would have found the decedent contributorily negligent and the defendant not guilty of negligence.

Our courts have frequently held that, where the cause of action is based upon a statute and there is evidence to support the statute's applicability, it is proper to instruct the jury in the language of the statute (Goldberg v. Capitol Freight Lines (1943), 382 Ill. 283, 47 N.E.2d 67; Reese v. Buhle (1958), 16 Ill.App.2d 13, 15, 147 N.E.2d 431; Selman v. Midwest Haulers, Inc. (1941), 309 Ill.App. 154, 160, 33 N.E.2d 140.)

In Reese v. Buhle, supra, quite similar in its facts to the case at hand, this court held it was reversible error to refuse an instruction in the words of the right-of-way statute. An additional policy factor considered by the court in reaching its conclusion is worthy of particular note:

Being at the throttle of an automobile capable of high speed induces a dangerous mood. Impatience, the taking of chances otherwise unthinkable in the ordinary man, and a spirit almost contemptuous of the slow-moving pedestrian often obsesses the driver. * * * The law must counter that mood and habit with a special devotion to those rules that protect the individual 'who through choice or necessity adopts the original mode of locomotion provided by nature.' The right of way statute is the most important of these rules, and failure to give the instruction on it was serious error (16 Ill.App.2d at 20.)

In the instant situation the right-of-way statute was the heart of the plaintiff's case and there was testimony in the record to support its applicability. The trial court's refusal to submit plaintiff's instruction number 13 to the jury accordingly worked to seriously prejudice the plaintiff's case. In light of these factors, tempered by the policy considerations enunciated in the Reese case, this court concludes that such failure to give the instruction constituted reversible error.

The final point raised by the plaintiff on appeal concerns statements made by defense counsel at trial referring to a "not guilty" verdict of the coroner's jury and plaintiff's failure to waive the Dead Man's Statute. As this case is being reversed and remanded for the reason set forth above, it is unnecessary to resolve this issue. Suffice it to say this court



believes that both subjects should not be brought before a jury on the retrial of this case.

The judgment of the circuit court of Cook County is reversed and the cause remanded for a new trial consistent with the views expressed herein.

REVERSED AND REMANDED.

STAMOS, P.J., and LEIGHTON, J., concur.

Abstract Only.



ABST

14 I.A.³ 305

57697

PEOPLE OF THE STATE OF ILLINOIS,	)	APPEAL FROM
ex rel. EDSSEL A. LICK,	)	CIRCUIT COURT
	)	COOK COUNTY
Relator-Appellant,)	
)	
vs.)	
)	
THEODORE P. FIELDS, Chairman,)	
ILLINOIS STATE PAROLE and)	
PARDON BOARD,)	
)	
and)	
)	
JOHN J. TWOMEY, Warden,)	
ILLINOIS STATE PENITENTIARY,)	
Stateville Branch,)	
)	
Respondents-Appellees.	)	HONORABLE JOSEPH A. POWER, Presiding.

PER CURIAM:

Edsel A. Lick [relator] was convicted in Cook County in 1952 for confidence game practices, and was sentenced to two concurrent terms of two to four years in the penitentiary. He was paroled in 1954, and five months later a warrant was issued charging him with violating the parole. In 1969 a detainer warrant was placed upon him, pursuant to the 1954 parole violation warrant, while he was incarcerated in a Texas penitentiary.

On September 22, 1971, relator filed the instant pro se petition for a writ of habeas corpus in the circuit court of Cook County, at which time he was still in the Texas penitentiary. He seeks to have the detainer warrant quashed on the ground that it prevented him from receiving benefits of parole and good behavior time on his Texas conviction, or in the alternative, to have his person returned to Illinois for an immediate hearing on the alleged parole violation.

The public defender of Cook County was appointed counsel for relator in the habeas corpus proceedings, and



he subsequently filed an amended habeas corpus petition, improving somewhat on the pro se petition, and also incorporating copies of the 1952 confidence game indictments and commitment orders. Both the pro se and the amended petitions were met by respondents' motion to dismiss, and after a hearing on the motions the amended petition was dismissed and the prayers for relief were denied, the trial court commenting that relator could have a hearing on the alleged parole violation upon his return to Illinois after serving his Texas sentence.

Relator contends on appeal that his petition for a writ of habeas corpus was erroneously dismissed, because the failure of the Illinois Parole and Pardon Board to afford him a timely hearing on his alleged violation constituted a subsequent "act, omission or event" within the terms of the Habeas Corpus Statute. He contends this entitled him to a discharge from the balance of time to be served under the 1952 sentences, and that the circuit court of Cook County was therefore not without jurisdiction to grant the writ of habeas corpus. The provision of the statute [Ill. Rev. Stat. 1971, ch. 65, pars. 1-36] upon which relator relies reads as follows:

If it appear that the prisoner is in custody by virtue of process from any court legally constituted, he can be discharged only for some of the following causes:

* * *

2. Where, though the original imprisonment was lawful, yet, by some act, omission or event which has subsequently taken place, the party has become entitled to his discharge. [Ill. Rev. Stat. 1971, ch. 65, par. 22.]

The contention here raised by the relator was expressly rejected in the case of People ex rel. Barrett v.



Crowe, 387 Ill. 53, 55 N.E. 2d 84, where the Illinois Supreme Court expunged a discharge order on the ground that the lapse of some nine years between the issuance of a warden's warrant for a parole violation and its execution did not, under the terms of the statute relied upon both there and here, give the trial court jurisdiction to grant the writ of habeas corpus.

Relator further contends that a petition for a writ of habeas corpus may be employed to challenge the legality of a detainer warrant. The Supreme Court intimated in People ex rel. Johnson v. Pate, 47 Ill. 2d 172, 265 N.E. 2d 144, that the expiration of a convict's maximum term of sentence might give rise to the remedy afforded by the Habeas Corpus Statute. In the instant case, however, it does not appear that relator may take advantage of the time lapse in that regard since, although relator's maximum term imposed on the 1952 convictions would have expired in 1956, neither the pro se petition nor the amended petition for a writ of habeas corpus alleges that relator was within the jurisdiction of the State of Illinois during the term of his parole. It is not alleged in the petitions that relator's absence from the jurisdiction of Illinois was involuntary, in light of the allegation that in 1965 he was in custody of Texas authorities, nor does either petition account for his whereabouts between the date of the issuance of the warrant in 1954 and the date in 1965 when he allegedly told Texas authorities that he was an Illinois parole violator, so as to be entitled to credit for time served on parole during that period against the balance of his 1952 sentences.

Relator contends that, if relief through the Habeas Corpus Statute is not available under these circumstances,



his petition should be treated as a petition for a writ of mandamus to secure a hearing on the alleged parole violation. In the case of People ex rel. Lewis v. Frye, 42 Ill. 2d 58, 245 N. E. 2d 483, the Supreme Court stated that the trial court could have treated the petitioner's petition for a writ of habeas corpus as a petition filed pursuant to the Post-Conviction Hearing Act, since constitutional matters and not jurisdictional matters were raised, but that the trial court was not bound to do so.

The respondents, in their brief on this appeal, strenuously resist relator's efforts to secure relief by way of habeas corpus. They openly admit, however, that relator has a remedy in mandamus if the detainer warrant is violative of his constitutional right to a timely hearing on the alleged 1954 parole violation, in view of the holding in Morrissey v. Brewer, 408 U. S. 471. The court there held that a parolee must be accorded due process on a revocation of his parole, which includes a hearing on the violation within a reasonable time and at a place reasonably near the place of violation. The respondents, however, argue that relator should not be afforded mandamus relief in this action because the grant of such relief would blur the distinction between mandamus and habeas corpus actions drawn by the legislature. We do not agree.

From the record in the instant case, it appears that relator is entitled to a hearing on the alleged 1954 parole violation, since the validity of the detainer warrant is in question and the warrant apparently jeopardizes certain of relator's rights under Texas penal procedures, which is not denied by respondents. Respondents admit that mandamus



would be the appropriate remedy for relief if the circumstances were as alleged by relator. Relator has requested this court to treat his petition for a writ of habeas corpus as a petition for a writ of mandamus in the event relief under the former petition is unavailable. This court has the power and discretion to exercise any or all powers of amendment as does the trial court [S. Ct. Rule 366(a)(1); Ill. Rev. Stat. 1971, ch. 110A, par. 366], and this court may also, on its motion, order an amendment to the pleadings [S. Ct. Rule 362(f); Ill. Rev. Stat. 1971, ch. 110A, par. 362; Harris v. Shuman (No. 57742, decided May 14, 1973), ___ Ill. App. 3d ___, ___ N. E. 2d ___]. As an alleged parole violator, relator is amenable to process under the Uniform Criminal Extradition Act for extradition to Illinois as a "fugitive from justice" for the purpose of a hearing in this regard. (People ex rel. Ross v. Becker, 382 Ill. 404, 411, 47 N. E. 2d 475; Ill. Rev. Stat. 1971, ch. 60, pars. 18-49, par. 22.) Both the State of Illinois and the State of Texas have subscribed to that Act. [Smith-Hurd Ann.Stat., ch. 60, page 581.] To require relator to file a new action in mandamus would, under the circumstances, be unnecessarily costly in both time and finances. The relator's petition for a writ of habeas corpus shall stand as a petition for a writ of mandamus, and he is granted a hearing on his alleged 1954 parole violation and on the question of whether that hearing is timely held in light of the facts there developed.

The judgment is reversed and the cause is remanded for proceedings not inconsistent with the views expressed herein.

Judgment reversed and
cause remanded with
directions.

THIRD DIVISION.
Justice McGloon did not participate.

58026

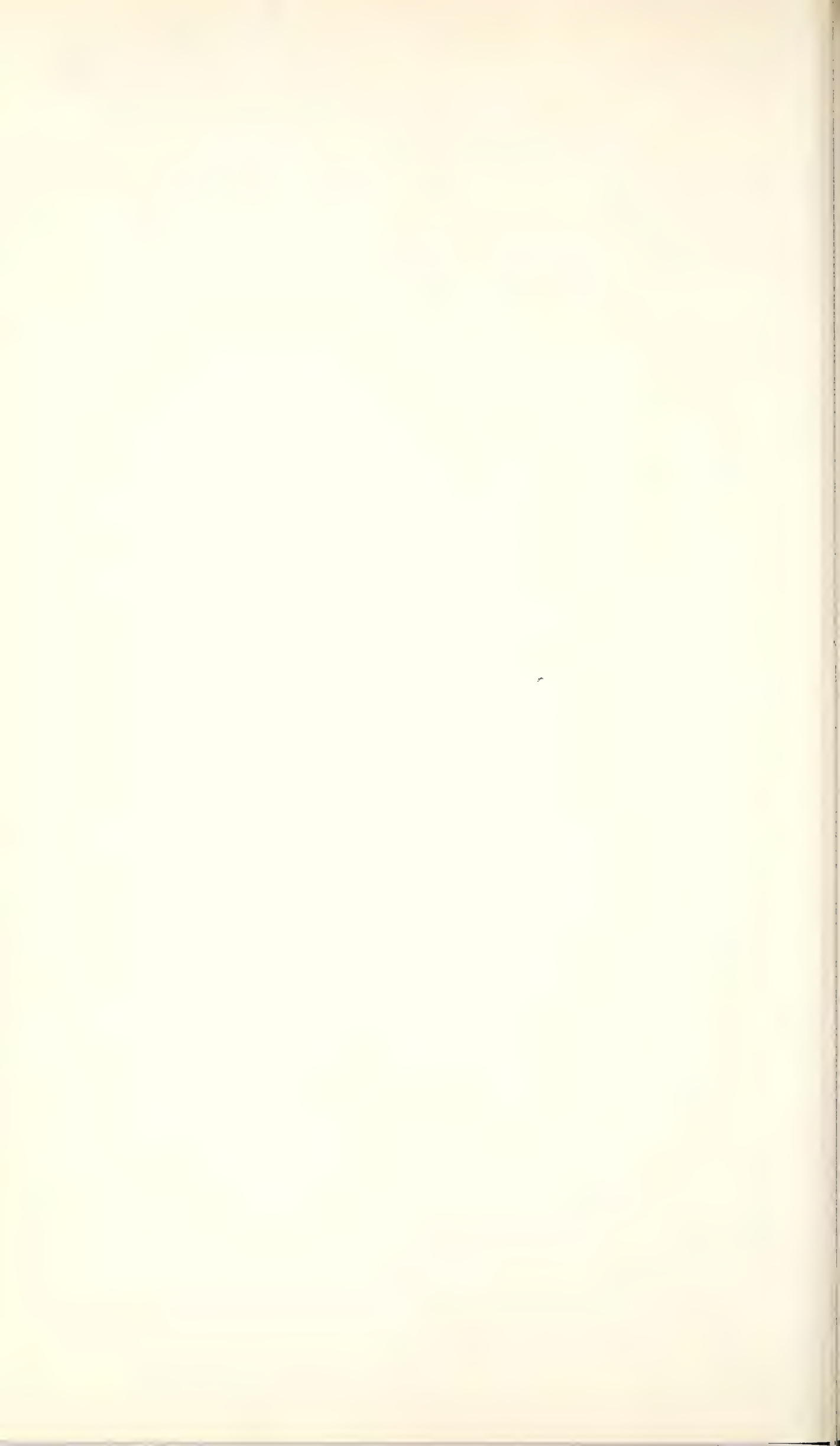
PEOPLE OF THE STATE OF ILLINOIS,)	
	)	APPEAL FROM THE CIRCUIT
Respondent-Appellee,)	
	)	COURT OF COOK COUNTY.
vs.)	
	)	Hon. Joseph A. Power,
ROCCO PADAVONIA,	)	Presiding.
)	
Petitioner-Appellant.)	

PER CURIAM:

Rocco Padavonia, hereafter called petitioner, pleaded guilty on March 16, 1966, to an indictment charging the crime of robbery. He was sentenced to a term of five to ten years. On January 27, 1972, petitioner filed a pro se post-conviction petition pursuant to the Post-Conviction Hearing Act (Ill.Rev.Stat. 1971, ch.38, par.122-1 et seq). On July 25, 1972, upon motion of the State, petitioner's pro se post-conviction petition was dismissed without an evidentiary hearing. Petitioner appeals that dismissal.

The public defender of Cook County who was appointed to represent petitioner on appeal has filed a motion for leave to withdraw. The motion, supported by a brief pursuant to Anders v. California (1967), 386 U.S. 738, states that the only available issue on appeal would be whether petitioner was entitled to an evidentiary hearing on the allegation in his post-conviction petition that his plea of guilty was coerced. The brief concludes that an appeal on this issue would be legally frivolous and without merit. Petitioner was mailed copies of the motion and brief on May 24, 1973. He was advised that he had until July 27, 1973, to file any additional points he might choose in support of his appeal. He has not responded.

In his pro se post-conviction petition, petitioner alleged that his plea of guilty was coerced in that his trial attorney told him that he should plead guilty and that after a jury trial, he would receive a greater sentence, based upon the fact that he had a bad prior record and was on parole at the time of the commission of the crime in the case at bar. At the hearing on the State's motion to dismiss, petitioner's counsel stated that



he had requested more specific reasons as to the coercion, but petitioner had not responded.

Petitioner's plea of guilty was entered only after a pre-trial conference with the court. Prior to accepting his plea of guilty, the trial court informed petitioner of the charge against him, of his right to be tried by a jury and of the maximum possible penalty. Petitioner persisted in his plea of guilty which was then accepted. There was a stipulation as to the facts. A hearing in aggravation and mitigation was then held at which it was disclosed that petitioner had three prior felony convictions for armed robbery and was presently on parole.

Petitioner's allegations of coercion are conclusions which are not sufficient to require a post-conviction hearing. People v. Williams, 52 Ill.2d 466, 288 N.E.2d 353. Even if considered, petitioner's allegations do not demonstrate coercion. The fact that petitioner's trial attorney advised him that he should plead guilty because after a jury trial he would receive a higher sentence than on a negotiated plea in view of his prior record does not demonstrate coercion. The fact that petitioner feared he would receive a higher sentence as a result of his past record does not establish that his plea of guilty was involuntary. People v. Worley, 45 Ill.2d 96, 256 N.E.2d 751; People v. Stephenson, 42 Ill.2d 185, 246 N.E.2d 268.

We have examined the record and concur in the opinion of the public defender that the argument thus raised is not arguable on its merits and is wholly frivolous. Our inspection of the record does not disclose any additional possible grounds for an appeal which are also not frivolous.

For the foregoing reasons, the motion of the public defender of Cook County to withdraw as counsel on appeal is allowed and the judgment of the circuit court of Cook County, dismissing the petition, is affirmed.

Motion allowed;
Judgment affirmed.

Third Division. JUSTICE DEMPSEY did not participate.





No. 58478

PEOPLE OF THE STATE OF ILLINOIS,)
)
 Appellee,)
)
 vs.)
)
 EDWARD MALEK,)
)
 Appellant.)

APPEAL FROM THE
 CIRCUIT COURT OF
 COOK COUNTY

HONORABLE
 JOHN GANNON,
 PRESIDING.

MR. JUSTICE LORENZ delivered the opinion of the court:

The instant case comes before us on defendant's motion for summary reversal of the trial court's order finding him in direct contempt of court and sentencing him to sixty days incarceration in the House of Correction. The State joins in defendant's motion by entry of a stipulation with defendant.

From the terms of the stipulation it appears that the trial court entered an order prohibiting defendant from harassing Janice Barker, that defendant did nonetheless harass Barker, that he did so outside the presence of the court, and that the trial court found that defendant's conduct was a direct contempt which could be punished without notice and hearing. It further appears that defendant served all or a major part of the sentence imposed upon him.

Defendant contends and the State agrees, citing People v. Javaras (1972), 51 Ill.2d 296, 281 N.E.2d 670, that since defendant's conduct took place outside the presence of the court, such conduct could not constitute direct contempt within the meaning of Javaras and rather was an indirect contempt which required defendant to be accorded notice and hearing. Since such notice and hearing was not accorded defendant in the instant case, the parties argue that defendant is entitled to summary reversal of the finding of contempt.

The case relied upon by the parties, People v. Javaras (1972), 51 Ill.2d 296, 281 N.E.2d 670, filed by the Supreme Court before the proceedings in the instant case were initiated, clearly distinguishes between the types of criminal contempt: direct contempt and indirect contempt. The difference between the two relates to whether the



conduct occurred in the presence of the court. If the conduct was within the presence of the court, including the constructive presence of the court, the contempt is direct; if not, the contempt is indirect. If the contempt was indirect, the contemnor is entitled to notice and hearing. Although direct contempt within the constructive presence of the court may also require notice and hearing, generally direct contempt does not entitle the contemnor to notice and hearing.

In the instant case, although the stipulation does not specify the specific conduct which the trial court determined to be in contempt, the parties agree that the conduct was outside the presence of the trial court and therefore an indirect rather than a direct contempt which entitled defendant to notice and hearing. Although we are reluctant to reverse a trial court's judgment without reviewing the full facts to determine if error occurred, in this case the State agreed that an error occurred. The order of the trial court is reversed.

Reversed.

DRUCKER, P.J. and ENGLISH, J., concur

[ABSTRACT ONLY]

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14 I.A. 317

PEOPLE OF THE STATE OF ILLINOIS,)	APPEAL FROM
Plaintiff-Appellant,)	CIRCUIT COURT
v.	)	COOK COUNTY.
EDWARD MARSHALL, a/k/a TAFT MORGAN,)	
Defendant-Appellee.	)	HONORABLE
	)	FRANK J. WILSON,
	)	PRESIDING.

MR. JUSTICE HALLETT delivered the opinion of the court:

Indictment 69-1122, charging the defendant with the unlawful sale of narcotic drugs, was dismissed by the trial court on the ground that the State had failed to bring the defendant to trial in accordance with the so-called 120 day rule, Ill. Rev. Stat., ch. 38, par. 103-5. On appeal, the State contends that the defendant was not being held on that particular indictment until it was reinstated less than three weeks before the dismissal and that, therefore, it should not have been dismissed. We conclude that this conclusion is a non sequitur and affirm.

Defendant was originally charged by indictment 69-1122 with the unlawful sale of a narcotic drug, and by related indictment 69-1123 with unlawful possession of a narcotic drug. Both cases arose out of the same transaction. A preliminary hearing was held on both cases together, both indictments were returned together and the trial files on both cases were identical. After several continuances, on July 25, 1969, the defendant failed to appear in court and a bond forfeiture was entered and warrants issued on both cases. A \$10,000 bond was set on indictment 69-1122, a \$5,000 bond was set on indictment 69-1123, and the indictments were stricken with leave to reinstate. Thereafter, indictment 70-211, charging the defendant with bail jumping and setting a bond of \$10,000 was returned in early 1970.

On July 9, 1970, the defendant was arrested on an unrelated charge which led to indictment 70-2394. At the preliminary hearing on indictment 70-2394, the clerk told the court

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"they are holding him (defendant) on two indictment warrants. One is \$5,000 and the other is \$10,000." On July 25, 1969, warrants were lodged against the defendant at Cook County jail on indictments 70-211 and 69-1123. The warrant on indictment 70-211 had written on the bottom left-hand corner indictment 69-1122 and 69-1123. No further action was taken on any of the three outstanding warrants until December 1, 1970, when, upon the State's motion, indictment 69-1122, charging the defendant with unlawful sale of a narcotic drug, was reinstated. On December 18, 1970, the defendant's motion to dismiss pursuant to section 103-5 of the Criminal Code of Procedures was granted.

The State contends that the trial court erred in granting defendant's motion to dismiss because the defendant was not in custody on indictment 69-1122. Section 103-5 of the Code of Criminal Procedures, entitled Speedy Trial, is a statutory implementation of the constitutional right to a public and speedy trial. That section, as revised in 1957, states as follows:

"Every person in custody in this State for an alleged offense shall be tried by the court having jurisdiction within 120 days from the date he was taken into custody unless delay is occasioned by the defendant.***."

The real issue in this case is, of course, whether the 120 day period, within which the defendant must be tried, began to run on July 22, 1970, when two warrants were lodged against him, or on December 1, 1970, when (interrelated) indictment 69-1122 charging sale of narcotics was reinstated. We conclude that the first alternative is the proper one and, therefore, affirm the trial court's discharge of the defendant.

The State first cites three cases, People v. Young (1970), 46 Ill.2d 82, 263 N.E.2d 72; People v. Walker (1968), 100 Ill.App.2d 282, 241 N.E.2d 594; and People v. DeStefano (1967), 85 Ill.App.2d 274, 229 N.E.2d 325; for the proposition that a defendant



"must be brought to trial within the period of 120 days following his confinement on the charge in question," but do not discuss the facts or holdings in any of these cases. In each of these cases, the court held that the defendant was not entitled to discharge because he had himself caused the delay on which he based his motion. We find nothing in any of these cases sustaining the State's restrictive position here.

The State next cites three more cases, People v. House (1957), 10 Ill.2d 556, 141 N.E.2d 12; People v. Kidd (1934), 357 Ill. 133, 191 N.E. 244; and People v. Franzone (1935), 359 Ill. 391, 194 N.E. 567; for the proposition that "a prerequisite to a defendant's being entitled to discharge under the provisions of the statute here in question is that it be shown that he was in fact incarcerated for the offense for which he now seeks release." In House, the court asked the defendant if he had an attorney and he said "yes, George Adams." The court then said "notify Adams and we'll continue this until Monday." The clerk then recorded this as "On motion of the defendant." The Supreme Court, reversed and remanded the case with instructions to discharge the defendant, holding that said continuance should not have been charged to the defendant. We see nothing in this case supporting the State's said proposition. Kidd and Franzone each related to the wording of the statute prior to 1957. Our courts have repeatedly held that the 1957 changes in this statute were intended to and did overcome the effect of these cases so that said decisions are now obsolete and no longer apply or control.

See:

People v. Ross (1958),
13 Ill.2d 11, 13-14, 147 N.E.2d 309;
People v. Swartz (1961),
21 Ill.2d 277, 281-2, 171 N.E.2d 784;
People v. Bryarly (1961),
23 Ill.2d 313, 316-317, 178 N.E.2d 326;



People v. Fosdick (1967),
 36 Ill.2d 524, 528, 224 N.E.2d 242;
People v. Gray (1967),
 83 Ill.App.2d, 262, 269-270, 227 N.E.2d 159.

The only other case cited by the State is People v. Jones, 33 Ill.2d 357, 211 N.E.2d 261. There the defendants were arrested on June 3, 1961, on completely unrelated charges. On June 23, 1961, defendants were indicted on the unrelated charges and on February 3, 1962, were found guilty. On June 3, 1961, police officers had information that the defendants were implicated in an armed robbery. Complaints were signed against them. No arrest warrants were issued against the defendants. On February 9, 1962, the defendants were indicted on the armed robbery charges. On February 28, 1962, the defendants' motion to dismiss the indictment on the grounds that they had not been brought to trial within four months was denied. On appeal the defendants argued that the law enforcement officers had knowledge of their alleged complicity in the crime charged in the new indictment as of the date when the complaint was filed in June, 1961. The Supreme Court rejected the defendants' contention, holding that, although the defendants were arrested on June 3, 1961, and imprisoned continuously thereafter, that imprisonment was solely in connection with an unrelated offense. The court held that the defendants' incarceration on completely separate offenses was not incarceration in connection with the subsequently prosecuted charges. The court specifically noted that no indictments had as yet been returned or warrants issued against the defendants at the time the complaints were filed or during the time that the defendants were incarcerated on the unrelated charge.

In the case at bar, unlike Jones, arrest warrants were outstanding against the defendant at the time of his arrest on the related charge. Two of the three outstanding warrants were in fact lodged against the defendant and one of those warrants referred in a notation to the third outstanding warrant against



the defendant. We conclude that Jones does not support the State's position here.

In People v. Patheal (1963), 27 Ill.2d 269, 189 N.E. 2d 309, the defendant was arrested on a warrant on August 20, 1959, in Coles County. On December 11, 1959, the defendant was turned over to the custody of the State Parole Agent on a parole violation and was returned to the penitentiary. On December 15, 1959, the defendant was indicted on the charge for which he was initially arrested. On January 21, 1960, the defendant was discharged from the penitentiary and was immediately arrested, returned to Coles County and tried on the indictment. The defendant made a motion to dismiss under the 120 day rule, which was denied. On appeal, the State argued that the 120 day rule did not apply since the defendant was not in the custody of the Coles County authorities, but was in the custody of the Department of Public Safety for a parole violation. In rejecting this contention and reversing the conviction, our Supreme Court, through Mr. Justice Schaefer, at pages 271 and 272, said:

"This argument is not persuasive. The fact is that the defendant was arrested and confined in the county jail of Coles County, by the legal authorities of Coles County, upon the charge here involved, from August 20, 1959, until December 11, 1959. Fiction would supplant fact if we were to say that this entire period of confinement, just nine days short of the statutory four months, is to be disregarded on the ground that Coles County had no legal authority to put the defendant in jail because he was technically within the custody of the Department of Public Safety. The constitutional right to a speedy trial does not depend upon such technicalities.

* * *

"It is true that the statute does not precisely cover the present case. It does not follow, however, that the delay in this case was justified. Whatever may be the reason for the statutory limitation to a single county, in this case the prosecuting authorities of Coles County were at all times aware of the defendant's whereabouts. They took no action of any kind until December 8, when only 12 days of the statutory four-month period remained. ***."



In People v. Gray (1967), 83 Ill.App.2d 262, 227 N.E. 2d 159, the defendant was in the penitentiary at Menard on September 7, 1965, when a complaint charging him with armed robbery was filed, bail set and an arrest warrant issued. On October 26, 1965, the authorities located him at Menard and a "detainer" warrant was filed there. On April 21, 1966, the defendant moved to have the said robbery case dismissed and on May 25, 1966, he was indicted for the offense set out in the complaint. On July 21, 1966, the trial court granted the motion and discharged the defendant.

On appeal, the State contended that the defendant had never been arrested or held in custody on the warrant; that the offense charged was a felony which could only be prosecuted by indictment; and that he had been brought to trial within 120 days after the date of the indictment.

In affirming the discharge the Appellate Court for the Fourth District, at pages 267, 270-271, 271-272, said:

"The State's Attorney knew, as of October 26, 1965, of the whereabouts of the defendant within the State. It is clear that there was authority to serve the warrant and to proceed with the prosecution of the matter. He had, at all times, the procedural means which were ultimately employed to bring the defendant into court for arraignment and trial, as was actually done approximately 11 months following the issuance of the complaint. Here the only affirmative step taken was to insure that the defendant would not be released from custody at the penitentiary, but would be served with the pending warrant.

"The Supreme Court has stated that it will not permit the State to evade the right of an accused to a speedy trial. People v. Fosdick, 36 Ill2d 524, 224 NE2d 242.***

* * *

"The Supreme Court has repeatedly stated that the statute in issue is designed to implement the constitutional rights and that it contemplates that all means which are available should be used, and that the burden is upon the State to try offenses promptly where the defendant is within the jurisdiction of the State. People v. Moriarity, 33 Ill 2d 606, 213 NE2d 516; People v. Bryarly, 23 Ill2d 313, 178 NE2d 326.***

* * *

"We conclude that under the decisions of the Supreme Court, the State's Attorney was under a duty to prosecute the charge through trial within 120 days from the discovery of the whereabouts of the defendant and the concurrent placing of the detainer warrant. We cannot satisfactorily distinguish the failure to serve the warrant in this case from the dismissal of a complaint and the voluntary relinquishment of custody to another agency as in *People v. Fosdick*, 36 Ill2d 524, 224 NE2d 242; *People v. Patheal*, 27 Ill2d 269, 189 NE2d 309; *People v. Swartz*, 21 Ill2d 277, 171 NE2d 784. To say that defendant, although within the jurisdiction of the State, is not in custody upon the arrest warrant issued in Morgan County but voluntarily withheld from service, supports a fiction and authorizes evasion of the constitutional and statutory provisions for prompt trial, and would limit, if not completely thwart, the preparation of a possible valid defense to the charge."

In *People v. Vaughan* (1972), 4 Ill.App.3rd 51, 280 N.E. 2d 253, the defendant was arrested, in St. Clair County, for a theft on March 12, 1969, and admitted to bail six days later. On May 9, 1969, he was indicted for theft and a capias prepared. About May 15, 1969, he was picked up by the Chief Adult Probation Officer for that circuit and taken to the Randolph County jail. On May 15, 1969, his arraignment in St. Clair County was called and, he being absent (in the Randolph County jail), his bond was forfeited and, on May 19, 1969, a bench warrant was issued. On May 23, 1969, his probation in Randolph County was revoked and he was sentenced to six months in the State Penal Farm. On May 28, 1969, the Sheriff of St. Clair County sent a capias and the bench warrants to the State Penal Farm to be lodged as detainers against the defendant and asking that he be advised when the defendant was to be released so that deputies could be sent to pick him up. On his release on October 24, 1969, he was returned to jail in St. Clair County, where he remained until he was tried and found guilty on December 9, 1969, after a motion to discharge for delay had been denied.

In reversing the conviction for failure of the prosecution to meet the 120 day deadline, the Appellate Court for the Fifth District, at page 54, said:



"Both cases which the defendant cites, and those cases cited in the Gray case, place upon the prosecution the duty to take affirmative steps to bring a defendant to trial when they know where he is being held in custody.

* * *

"This decision and the previous cases set the boundaries for determining when the statute began to run. Here, the prosecution knew that the defendant was in the Penal Farm and in fact sent a letter to the Penal Farm, containing the warrants and a capias to be held as a detainer of the defendant, and the period began on the day the letter was received."

In People v. Williams (1971), 2 Ill.App.3d 993, 278 N.E.2d 408, the defendant was arrested on charges of murder and attempt murder on September 29, 1967. The defendant was thereafter indicted for murder and several continuances as well as a behavior clinic examination were had upon that indictment. Some nine months later, the defendant was indicted on the charge of attempt murder, arising out of the same set of circumstances. The defendant made a motion for discharge on the grounds that he had been denied his right to a speedy trial and the motion was granted. The State appealed, arguing that since the crimes were interrelated, the motions for a continuance and behavior clinic examinations had on the murder charge should be transferred to the attempt murder charge. This court rejected the State's argument and affirmed the discharge, saying, at page 994:

"***The State waited from September 1967 to June 1968, before presenting the attempt murder case to the Grand Jury. Because it had chosen to proceed on the murder charge alone, the State, and only the State, was responsible for the separation of charges and the long delay in attaining the attempt murder indictment."

In the case before us the defendant was incarcerated in Cook County jail under his own name on an unrelated charge on July 9, 1970. At that time, the State's Attorney knew the defendant's whereabouts and had authority to serve outstanding warrants on indictment 69-1122, 69-1123 and 70-211, all issued in Cook County. The State was made specifically aware of



several outstanding warrants against the defendant by the clerk's statement at the preliminary hearing that there were two indictment warrants outstanding against the defendant. Arrest warrants on indictments 69-1123 and 70-211 were lodged against the defendant in Cook County jail. The warrant on indictment 70-211 on the bottom left-hand corner referred to both indictments 69-1122 and 69-1123. The State took no action to prosecute any of the three outstanding cases against the defendant for over four months.

Indictments 69-1122 and 69-1123 were interrelated charges. Both indictments resulted from the same course of conduct. A preliminary hearing was held on both charges together, both indictments were returned at the same time with consecutive numbers and the court records on both indictments were identical showing bond forfeiture warrants issuing on July 25, 1969. At the hearing on the motion to dismiss the State agreed that they were barred from proceeding against the defendant on indictment 69-1123, but argue that since the arrest warrant on indictment 69-1122 was not technically lodged against the defendant he was not incarcerated on this charge. To accept this argument would be to rely upon a technicality. The State was aware or should have been aware of the arrest warrant outstanding against the defendant on indictment 69-1122. Whether the arrest warrant on indictment 69-1122 was not lodged against the defendant by deliberate action or by mistake it would be a technicality to say that he was not in custody on that charge. Here, at the time of the defendant's incarceration in Cook County jail the State was aware that there were outstanding warrants issued from Cook County against him. Two of these warrants were lodged against him in Cook County jail. One of the warrants, 69-1123, was on a closely related case to the indictment in question, 69-1122. The State took no action to prosecute any of these three indictments for over four months. Under these circumstances,



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the defendant's constitutional right to a speedy trial as implemented in the Code of Criminal Procedure (Ill. Rev. Stat. 1969, ch. 38, par. 103-5) was violated.

We therefore affirm the judgment dismissing the remaining indictment.

JUDGMENT AFFIRMED.

Goldberg and Egan, JJ., concur.

(Abstract only.)





57849

PEOPLE OF THE STATE OF ILLINOIS,)	
	)	APPEAL FROM THE CIRCUIT
Plaintiff-Appellee,)	
	)	COURT OF COOK COUNTY.
vs.)	
	)	Hon. Saul A. Epton,
JAMES AUSTIN,	)	Presiding.
)	
Defendant-Appellant.)	

PER CURIAM:

Defendant, James Austin, was convicted, following a bench trial, of two counts of aggravated battery, one count in violation of Ill.Rev.Stat. 1969, ch.38, par.12-4(a) in that he "intentionally and knowingly, without legal justification, committed a battery on Rickey Conner which caused great bodily harm" and a second count in violation of Ill.Rev.Stat. 1969, ch.38, par.12-4(b)(1), in that "he, in committing a battery on Rickey Conner used a deadly weapon." He was sentenced to not less than one nor more than two years on each charge, the sentences to run concurrently. On appeal he argues that the State did not prove him guilty beyond a reasonable doubt and that since both offenses arose out of the same conduct, his conviction and sentence for both offenses was improper. The State has confessed error as to the latter contention.

Rickey Conner, the victim, testified that he was 21 years old, and employed as a car hiker. In the early morning hours of December 21, 1971, he visited the home of his uncle, Robert Daniels, on the second floor at 5636 South King Drive. Earlier that night defendant, a friend of his uncle who lived in an apartment on the third floor, threatened him on the telephone, saying his (defendant's) nephews were out looking for him and were going to kill him. He had never had any arguments with the defendant before that time. The witness was not happy about the phone call, but was not angry either and thought that defendant was joking. He also denied telling defendant, "You got my uncle drinking again" earlier that day and denied



saying, "I am going to come back, I am going to waste you." He and his uncle went up to the third floor to ask the defendant why he wanted to threaten Conner's life. His uncle opened the hallway door and they went to defendant's apartment, finding the door open and the defendant in his apartment. Defendant told Conner not to come into his apartment and Conner said he would not. He then "laid up against the wall" waiting for his uncle about five or ten minutes, when defendant opened up the refrigerator, which Conner could see from the hallway, and shot him above the groin. When he was shot, he hit the wall and the defendant said he would shoot him if he moved. Conner begged the defendant to call somebody and his uncle asked the defendant not to shoot any more. As a result of being shot he was hospitalized for two months and at the time of the trial testified he could not stand too long.

Robert Daniels testified: he is 50 years old, a disabled veteran, and a "very good friend" of defendant for 20 years. His nephew, Rickey Conner, rang his doorbell in the early morning hours of December 21 and said he wanted to go up to see the defendant. Rickey, a little in front of him, went over to defendant's apartment and defendant said, "I told you not to come in my apartment." Defendant was by the frigidaire when he said this and Rickey was standing in the doorway. Defendant then took a gun from his pocket and shot Conner. The witness told the defendant not to shoot any more and the defendant told him to call the police, which he did. His nephew did not seem to him to be angry and seemed to be in a good mood.

Recie Bronn, Conner's mother, testified that the defendant had made her son "mad over the telephone" by "calling his mother, talking in the kind of way to his mother so he was mad." She said her son went to see his uncle because he was mad, he did not have a knife or gun with him when he left.



Chicago police officer J. Kosta testified that he responded to a radio call at the premises and when he arrived the defendant handed him the gun saying, "I shot him." The gun was admitted into evidence. The victim was lying on the floor of the hallway.

Chicago police officer Jasper testified the victim was lying on the floor inside the hall approximately ten feet from the apartment when he arrived.

Recalled to the stand, Rickey Conner testified he did not have any type of weapon in his possession before or during the time he went to the defendant's apartment, did not tell or indicate to the defendant that he had a weapon or threaten him in any way or make any gestures with his hands in his pocket indicating he might have a weapon.

Chicago police investigator William Finn testified that the defendant told him that the previous night he had had an argument with Conner, that Conner had come with his uncle to his apartment and they had talked and watched television. During the course of the argument he asked Conner and his uncle to leave, but the argument became more heated and Conner threatened the defendant. Defendant also stated that he was afraid of the younger generation and that inasmuch as Conner had threatened to kill him, he, the defendant, pulled out a gun which he had in his pocket and shot Conner. Defendant told him Conner had said, "Draw, or else I'm going to draw and kill your ass," and his report showed that Conner threw a chair at the defendant. He also talked to Mr. Daniels that night and Daniels told him nothing that contradicted what the defendant had said to him.

Defendant, James Austin, whose age was stipulated to be 52, testified that on December 21, 1971, about three o'clock in the morning he was home watching a late movie when Robert Daniels and Rickey Conner came up to his room. Daniels came in and sat down in his usual chair by the window, and Conner was behind him.



Conner came in and said, "Oh, you thought I wasn't coming back." The witness was at the frigidaire and he was frightened of Conner because Conner had been up there that evening. He did not say anything to Conner, just looked at him as Conner was "prancing and motioning" Conner came in and knocked over the clothes valet. The witness stayed behind the frigidaire door, and Conner started yelling, "If you draw you are dead, if you draw you are dead." As Conner was "prancing, trying to get up on" the defendant, the latter pulled a gun and shot Conner. He did not invite Conner into his home that day. On the previous day Conner had come to his apartment and told him to stay away from his uncle, saying, "You got him drinking again." Defendant called the police station, but the police did not come. He admitted he had not seen anything in Rickey's hand and said he was seven to ten feet away from the victim at the time he shot.

Defendant relies primarily on the similarity, according to his version of the event, between the facts in the instant case and those in People v. Givens (1962), 26 Ill.2d 371, 186 N.E.2d 225. The Supreme Court there held that the homicide in question was committed by the defendant in his own home against one who unlawfully entered it and from whom he reasonably feared an assault, if not actual peril to his life. Givens is distinguishable from the facts here because in Givens the testimony was not in conflict. While the victim's mother testified he was angry when he left home, the victim himself testified that he was not upset when he arrived at the defendant's apartment. His uncle confirmed this. Although his uncle testified the defendant told the victim not to enter the apartment, the only evidence the victim even entered the apartment was given by the defendant and was directly contradicted by the victim and his uncle and the testimony of the two investigating police officers who saw the victim lying in the hallway, not inside defendant's apartment,



when they arrived. Where the evidence is merely conflicting, the reviewing court will not substitute its judgment for that of the trier of fact. People v. Garcia (1967), 90 Ill.App.2d 396, 232 N.E.2d 810.

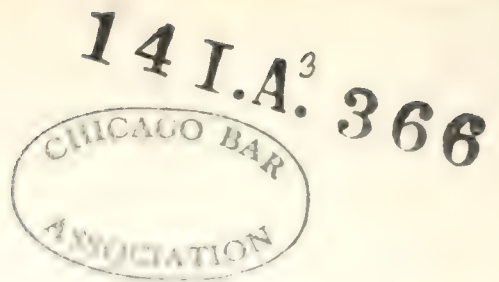
The defendant here was charged with two offenses which arose from a single act and, accordingly, the conviction and sentence for the less serious offense (12-4(b)(1) in this case) must be vacated. People v. Legget (1971), 2 Ill.App.3d 962, 964, 275 N.E.2d 651. People v. Lerch (1972), 52 Ill.2d 78, 81, 284 N.E. 2d 293. The judgment of the circuit court of Cook County entered on Count I of the indictment based on the violation of paragraph 12-4(a) of Ill.Rev.Stat. 1969, ch.38 and the sentence entered upon the judgment is affirmed and the judgment of conviction under Count II of the indictment is vacated.

Judgment affirmed in part;
judgment vacated in part.

Third Division. Justice SCHWARTZ did not participate.

8/23/73

10 p.m.
2nd Div



No. 58744

PEOPLE OF THE STATE OF ILLINOIS,)
ex rel EMANUEL WADE,)

Relator-Appellant,)

vs.)

JOHN J. TWOMEY, WARDEN ILLINOIS)
STATE PENITENTIARY, JOLIET,)
ILLINOIS,)

Respondent-Appellee.)

APPEAL FROM THE
CIRCUIT COURT OF
COOK COUNTY

HONORABLE
JOSEPH A. POWER,
PRESIDING.

*

PER CURIAM (Fifth Division, First District):

The relator, Emanuel Wade, appeals from the dismissal of his petition for a writ of habeas corpus.

Originally, the relator was charged with the crime of murder. After a jury trial, he was found guilty and sentenced to not less than 20 nor more than 25 years in the State Penitentiary. The judgment was affirmed by the Appellate Court. People v. Wade, 71 Ill.App.2d 202, 217 N.E.2d 329. Thereafter, the relator filed a pro se post-conviction petition alleging the denial of constitutional rights, inter alia, that his counsel had not represented him adequately and that the State had knowingly used perjured testimony to secure his conviction. The petition was dismissed in the trial court on motion of the State. On appeal the Illinois Supreme Court reversed without an opinion and remanded the cause for an evidentiary hearing (Ill. Supreme Court docket No. 41402.) See People v. Wade, 47 Ill.2d 38, 264 N.E.2d 207.

On remand, new counsel was appointed to represent the relator. The pro se petition was abandoned and an amended petition was filed. In the latter petition it was alleged that the relator had been deprived of due process of law by the trial court's action in permitting the voluntary manslaughter charge to be nolle prossed after the trial had started; by the failure of the trial court to hold a "meaningful" hearing in aggravation and mitigation; by the failure of defendant's

* MR. JUSTICE ENGLISH did not participate.



counsel, the State's attorney, and the trial court to advise the relator that he had acted unreasonably in rejecting an offer of a light sentence in return for a plea of guilty on the manslaughter charge; and by prejudicial closing argument of the prosecutor. The amended petition was also dismissed on motion of the State, which motion set forth that the issues sought to be raised by the petition were not of constitutional stature or, alternatively, that the relator had waived his claims and was barred from raising them under the doctrine of res judicata by virtue of his failure to raise them on his appeal to the Appellate Court. The Illinois Supreme Court affirmed the judgment of the trial court in dismissing the amended petition. People v. Wade, 47 Ill.2d 38, 264 N.E.2d 207.

On November 8, 1972, the relator filed his petition for a writ of habeas corpus which was dismissed upon motion of the respondent. The relator alleged that he was entitled to his immediate release because "on March 25, 1969 the Illinois Supreme Court issued its order granting petitioner's motion for an evidentiary hearing in the trial court on the petitioner's pro se post-conviction petition; that thereafter the trial court appointed new counsel to represent the relator; that new counsel abandoned the relator's grounds, which were well founded in law and in fact, and substituted a different petition"; and that the record shows the relator is entitled to "immediate relief."

The prayer of the petition was denied. The relator appealed from the order dismissing his petition for writ of habeas corpus and the Public Defender was appointed to represent him.

Pursuant to Anders v. California, 386 U.S. 738, the Public Defender has moved for leave to withdraw. The motion was supported by a brief. The relator has filed a brief in answer to the Public Defender's motion for leave to withdraw, in which he alleged that the relator was not given a hearing on mitigation or pre-sentence investigation, even though he had no criminal record, prior to the judgment of guilty and sentencing in the original trial. The relator also contended that the proceedings in the trial court and the Public



Defender's motion to withdraw do not meet the guidelines outlined by the United States Supreme Court in the case of Anders v. California, 386 U.S.738, and that he believes his case had constitutional, legal, plausible points that have merit and, therefore, is not frivolous. The relator prayed that this court deny the motion of the Public Defender to withdraw; that the Public Defender file a brief in support of the grounds on their merits, or that the court appoint counsel other than the Public Defender of Cook County, or on the court's own decision give the petitioner a modification of his sentence or order the original pro se petition reinstated and order the trial court to hold an evidentiary hearing.

A careful reading of the relator's brief in opposition to the Public Defender's motion to withdraw in accordance with the case of Anders v. California, discloses that all arguments presented therein pertain to alleged errors which occurred at the original trial, some of which were discussed and rejected by the Illinois Supreme Court in reviewing the relator's post-conviction petition. People v. Wade, 47 Ill.2d 38, 264 N.E.2d 207. The relator relies upon the case of People ex rel Lewis v. Frye, 42 Ill.2d 311, 247 N.E.2d 410 to sustain his contention that the petition for a writ of habeas corpus has "constitutional, legal, arguable points that have merit, and therefore, is not frivolous." However, the Supreme Court in the Frye case held that a court has jurisdiction to release a prisoner on habeas corpus only where the original judgment under which the prisoner is incarcerated was void, viz., rendered by a court lacking jurisdiction of the subject matter or of the person of the defendant, or where "something has happened" since his retention under the conviction to entitle the prisoner to release; and that the remedy is not available to review errors of non-jurisdictional nature, even though a claim of a denial of constitutional rights might be involved.

In the case at bar there are no allegations of fact in the habeas corpus petition that the trial court lacked jurisdiction over the subject matter or the person of the relator. In addition there is no



claim of any occurrence since the judgment of conviction which would entitle the relator to release. Therefore, the Frye case is not in support of, but rather is contrary to, the contentions of the relator.

The record discloses that the trial court did not err in dismissing the relator's petition for writ of habeas corpus. None of the relator's contentions reveal that the trial court lacked jurisdiction. Habeas corpus is not available to review errors of a non-jurisdictional nature. People ex rel. Skinner V. Randolph, 35 Ill.2d 589, 221 N.E.2d 279; People ex rel. Rose v. Randolph, 33 Ill.2d 453, 211 N.E.2d 685. The relator's original conviction on December 5, 1963 was entered by a court with jurisdiction over the subject matter and the relator, and nothing has happened since its rendition to entitle the relator to release. People ex rel. Jefferson v. Brantley, 44 Ill.2d 31, 253 N.E.2d 378.

The facts in the case at bar are similar to those in People ex rel. Morgan v. Twomey, 9 Ill.App.3d 1006, 293 N.E.2d 682. There the petitioner filed a pro se petition for a writ of habeas corpus, which was dismissed in the trial court on motion of the respondent. Petitioner appealed and the Public Defender, who was appointed to represent him, filed a petition for leave to withdraw as appellate counsel, pursuant to the requirements set out in Anders v. California, 386 U.S. 738. The court allowed the petition of the Public Defender to withdraw as appellate counsel and affirmed the judgment of the trial court.

We have examined the record and concur in the opinion of the Public Defender that none of the arguments raised has substantial merit; nor does our inspection of the record disclose any additional possible grounds for appeal which are not also frivolous.

The motion of the Public Defender for leave to withdraw is allowed and the judgment of the circuit court of Cook County affirmed.

MOTION ALLOWED:
JUDGMENT AFFIRMED.

[ABSTRACT ONLY]

7/24/13

5-6.

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14 I.A.³ 367



No. 57566

PEOPLE OF THE STATE OF ILLINOIS,))	APPEAL FROM THE
Plaintiff-Appellee,))	CIRCUIT COURT OF
vs. )	)	COOK COUNTY
BENNIE F. GATES,))	
Defendant-Appellant. )	)	HONORABLE
		KENNETH R. WENDT,
		PRESIDING.

*
PER CURIAM (Fifth Division, First District):

Defendant was found guilty by a jury of the offense of aggravated battery by use of a deadly weapon (Ill. Rev. Stat. 1969, ch. 38, sec. 12-4.) and was sentenced to a term of one and one-half years to four and one-half years.

Defendant appeals, contending that the prosecutor improperly questioned defendant and several rebuttal witnesses as to whether defendant had made statements concerning his claim of self-defense prior to trial; that the court improperly denied defense counsel the right to elicit from defendant his state of mind at the time of the incident, and that the State failed to prove his guilt beyond a reasonable doubt.

EVIDENCE

Helen Boltz, for the State:

She was employed for almost 25 years by the Dearborn Glass Factory in Bedford Park, Illinois, as a glass cutter; that on June 11, 1971, she was working as a "pick-up girl" and inspector, which required her to inspect glass as it comes to the washing machine after having been cut by the cutter; to discard imperfect glass in a glass barrel and to stack the good glass on a truck. As glass is stacked she inserts a slip of paper between the plates.

She knew the defendant, who was employed by the glass company as a porter, for a period of about two or three months. At about 10:20 A.M. on June 11, 1971, the defendant entered the area of her work station and commenced placing paper into her glass barrel, instead

* MR. JUSTICE ENGLISH did not participate.

of into a trash barrel. When she asked him what he was doing, the defendant struck her with a broom he was holding. She went to her foreman, Frank Bednarz, and had a conversation with him. Bednarz conversed with defendant and the two men went off in different directions while she returned to her work station.

About five minutes later defendant returned to her station with his broom and began throwing good glass on her truck. When she asked him what he was doing, he again struck her with the broom. She attempted to report the matter to her foreman, but he was busy on the telephone and she turned to go to the washroom. She spoke to a fellow employee in the boiler room and upon exiting the boiler room she heard a holler or a scream, she turned and saw the defendant behind her with a piece of glass in his hand. The defendant struck her in the neck with the glass "from top to bottom" and began to kick her as she turned to run. She was "bleeding all over and screaming." She was taken to the company's first aid room and later to a hospital, where she remained for eight days.

She first denied but later, on cross-examination, admitted having her hands under her work apron but denied having a razor blade under the apron or carrying a razor or threatening the defendant. She also denied having had arguments with the defendant prior to the day in question or having made racially based comments to him on prior occasions. She described the apron she wore over her dress as one you could not see through, a blue work apron which covered her mid-section. She occasionally used a razor which lies on her machine for cutting cardboard, but she did not use the razor that day.

Frank Bednarz, for the State:

He was the cutting department foreman at the glass company on June 11, 1971, and Mrs. Boltz worked under him; on the morning in question he was summoned to Mrs. Boltz' station concerning an argument about throwing paper and he told them, "Let's cut it out, being kids." He was called to the telephone and twenty minutes later he saw Mrs.



Boltz walking down the aisle toward him. He heard a woman's scream in the hallway and saw the defendant kicking Mrs. Boltz, and Mrs. Boltz running and holding her throat. There was "a lot of blood" over the front of Mrs. Boltz, so he placed a handkerchief around her throat and took her to first aid. He did not see the defendant, nor did he see Mrs. Boltz at the time he heard a woman's scream. He did not know whether Mrs. Boltz had a razor blade. He did not see the cutting nor did he know whether Mrs. Boltz threatened the defendant. Mrs. Boltz' work does not involve the use of a razor blade and she never had occasion to use a razor blade. Defendant never stated to him nor did he ask the defendant whether Mrs. Boltz had threatened him with a razor or whether she had a razor in her hand.

Herman Lewis for the State:

He was employed at the glass company, working in the cutting department on June 11, 1971. He knew Mrs. Boltz and defendant, and he described her job function. He observed the argument between the two parties on the day in question and the effort by Bednarz to straighten out the controversy. He saw Mrs. Boltz leave her station and proceed in the direction of the boiler room with the defendant following 15 feet behind her, carrying a small piece of glass in his hand. He lost sight of the two parties, he heard a scream and then saw Mrs. Boltz exit the boiler room with the defendant close behind, either kicking her or kicking at her. Mrs. Boltz had her hands around her throat and Bednarz placed a kerchief around her neck. Later the defendant changed shoes and left the plant without punching out. He stated that there had been arguments between the defendant and Mrs. Boltz in the past, that he was able to see both parties during the initial argument on the day in question but that he did not see either of them strike the other. He did not see the defendant carrying a broom that day.

Albert Rezek, for the State:

He was a police officer for Bedford Park. On June 11, 1971, he was called to the glass company, had a conversation with a person at



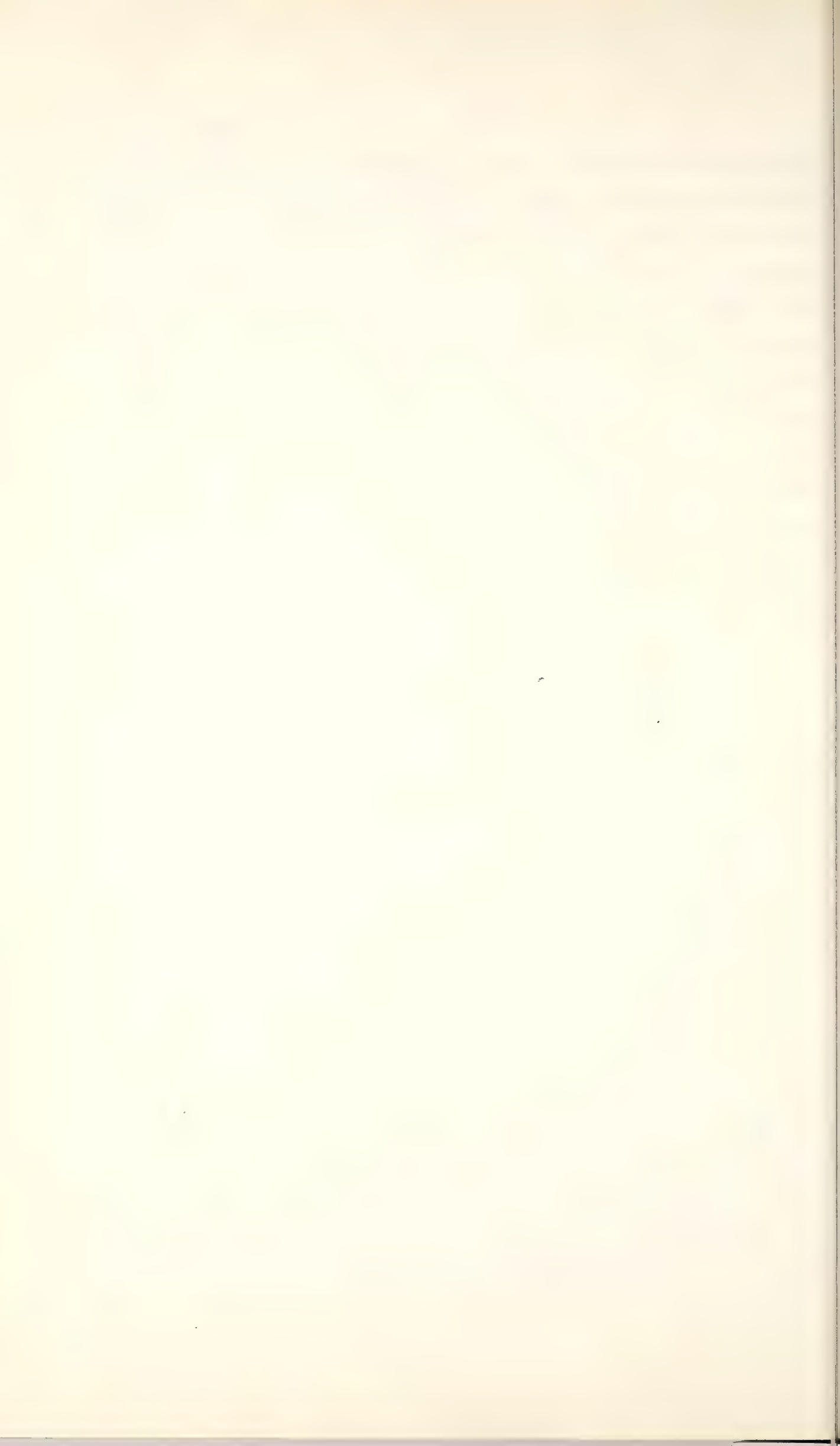
the plant and immediately pursued, apprehended and placed the defendant under "arrest for questioning" four or five blocks away; they returned to the glass plant where the defendant was identified by the plant superintendent, who asked if a knife had been found. Defendant stated he had used a piece of glass. Defendant was then turned over to Officer Dubois. Defendant was not given any constitutional warnings until he was taken to the police station. The witness returned inside the plant where he recovered glass which was broken in pieces near the boiler room and turned it over to Officer Dubois. The glass had a blood stain on the corner, but he did not know of his own knowledge that it was blood or how long it was on the glass, but the stain was wet. He found nothing on the ground other than the glass. He did not know whether the glass identified as a State's exhibit was the same glass that he gave to Officer Dubois.

Police Officer Leo Dubois, for the State:

He is a police officer for Bedford Park. He received glass from Officer Rezek at the glass plant; he took the glass to the police station where he marked it with identifying marks, and each little piece of glass given to him was so marked and placed in the station evidence cabinet, which was locked with a key kept by the captain. He identified the glass as being in the same condition as when he physically marked it. Mrs. Boltz did not complain to him that defendant struck her with a broom.

Defendant, in his own behalf:

He was employed as a janitor at the glass plant on the day in question; there was paper on the floor at Mrs. Boltz' station, so he picked it up and put it into the paper barrel but Mrs. Boltz removed it and threw it back onto the floor. She placed her hand underneath her apron and directed a racial slur at the defendant, then walked to the boiler room, where defendant's foreman's office was located. Defendant followed her, Mrs. Boltz repeated the racial slur toward him while bringing her hand from under her apron and defendant "swung" the piece



of glass which he held in his hand at her. Mrs. Boltz had made derogatory remarks to him in the past but they had never argued, and Mrs. Boltz started the argument on June 11, 1971. Defendant denied striking Mrs. Boltz with a broom or other object prior to the cutting and denied attempting to kick her after the cutting. Defendant stated that the work which Mrs. Boltz performs required her to use razor blades. On cross-examination he testified that thirty minutes after the first argument he returned to Mrs. Boltz' station. She was reaching under her apron but he did not know what she was reaching for. When he walked off toward his supervisor's office in the boiler room after Bednarz and Mrs. Boltz had left the area of the argument, he was carrying papers and a piece of thin glass about a foot, twelve inches by ten or eight, which he had picked up off the floor, but he was not following Mrs. Boltz to the boiler room. At the boiler room Mrs. Boltz told him to get out of her way, again employing a racial slur in the process, and, as she partially removed her hand from beneath her apron, the defendant struck at her with the glass. He then changed his shoes and left the premises to go home.

The defendant was asked by the prosecutor whether he told anyone that Mrs. Boltz placed her hand under her apron or that she made verbal statements to him prior to the cutting, to which he replied that he had no reason to explain his case to anyone. He was also asked if he spoke to Mr. Lewis or to a lawyer, at which point defense counsel objected. Also objected to by defendant counsel were questions asked of the defendant whether he told the police and the people at the glass company upon his return with the police of what Mrs. Boltz said or did prior to the cutting. None of the objections were sustained and the defendant answered the questions in the negative. Several questions asked of defendant as to his state of mind at the time of the cutting were objected to by the prosecution and the objections were sustained.

OPINION

Defendant contends that the trial court committed prejudicial error in overruling objections made by defense counsel to questions



propounded by the prosecutor during cross-examination of defendant and during the examination of the State's rebuttal witnesses, relative to whether the defendant did not tell them he acted in self-defense or that Mrs. Boltz was carrying a razor blade and in further overruling an objection to the prosecutor's comment upon that same matter during closing argument to the jury.

Since Miranda v. Arizona (1966), 384 U.S. 436, it has been held improper to elicit evidence that an accused stood mute or claimed his privilege under the Fifth Amendment to the United States Constitution against self-incrimination while in police custody. People v. Lampson (1970), 129 Ill.App.2d 72, 262 N.E.2d 601; People v. McDowell (1972), 4 Ill.App.3d 382, 280 N.E.2d 471. See also People v. Rothe (1934), 358 Ill.52, 192 N.E.777.

In the instant matter, the arresting officer, Rezek, testified that he did not advise defendant of his constitutional rights, but that defendant was advised of his rights after being transported to the police station. Defendant was nevertheless asked, over objection of defense counsel, whether, upon his return with Officer Rezek to the scene of the cutting, he had told "these gentlemen" -- meaning Officers Rezek and Dubois-- what Mrs. Boltz had said or done during the incident. Later, on rebuttal, Rezek himself was specifically asked whether defendant told him that he acted in self-defense or whether he told the officer that Mrs. Boltz carried a razor during the incident. The prosecutor also commented to the jury during closing argument that the defendant never "volunteered" to those at the glass plant after his return in police custody that he had acted in self-defense and defense counsel's objection to the comments were overruled.

In People v. Johnson (1971), 2 Ill.App.3d 965, 275 N.E.2d 649, the defendant was apprehended at the scene of a burglary perpetrated by him and was seen carrying goods from the premises; he was advised of his constitutional rights; he stated that he wished to remain silent and to have an attorney, and these matters were testified to at trial

by an officer; the court on review stated that the error so committed was harmless; the evidence as there noted, however, was overwhelming as to defendant's guilt.

The testimony of Mrs. Boltz is that defendant attacked her and cut her with a piece of glass and defendant admits that he cut the woman. However, unlike Johnson, defendant here interposed the defense of self-defense. The prosecution clearly sought to discredit this defense in the eyes of the jury by improper means, namely, by eliciting evidence of and commenting upon the fact that defendant remained silent relative to facts which would have established that defense at the time that he was returned to the glass plant in police custody. The error committed here could have directly influenced the jury in their deliberation as to the defendant's guilt, since it was made to look as though the defendant for the first time at trial conjured up the concept of self-defense and fabricated a story accordingly.

The State's position that the prosecution's actions in this regard simply "illustrated the implausibility of" the defendant's theory of self-defense, overlooks the means by which the prosecution sought to discredit that defense. In this respect, the employment of improper means cannot be justified by the ends sought.

The cases cited by the State in support of its position--that silence by an accused, at a time when some explanation would naturally be forthcoming, may be used against that person at trial--must be considered in light of the Miranda decision. People v. Turner (1968), 91 Ill.App.2d 436, 235 N.E.2d 317, and People v. Jackson (1968), 103 Ill.App.2d 209, 243 N.E.2d 551, both relied upon the case of People v. Aughinbaugh (1967), 36 Ill.2d 320, 223 N.E.2d 117. The Aughinbaugh case, in turn, does not mention the Miranda decision and, further, was an appeal from a trial which had taken place prior to the date of the Miranda decision: Johnson v. New Jersey (1966), 384 U.S. 719, held that Miranda did not have retroactive effect. People v. Jones (1970), 47 Ill.2d 135, 265 N.E.2d 125 also cited by the State, involved a trial



which pre-dated the Miranda decision. None of the cases cited by the State are applicable.

Defendant next argues that the trial court improperly denied him the right to elicit evidence in support of his theory of self-defense, that of his mental state at the time of the incident. Several questions propounded to the defendant by defense counsel as to what he believed Mrs. Boltz had in her hand prior to the cutting, why he cut her with the glass, and whether Mrs. Boltz made racial slurs to him in the past, were objected to by the prosecution and the objections were sustained.

There was a basis in the defendant's evidence for a claim of self-defense and he therefore had a right to testify as to his intention, motive and belief since it bore directly on that claim. People v. Biella (1940), 374 Ill.87, 28 N.E.2d 111; People v. Johnson (1969), 108 Ill.App.2d 150, 247 N.E.2d 10.

The thrust of the State's argument in support of the trial court's refusal to permit the defendant to testify in that manner is that the defendant was the aggressor and the record discloses no justification for the use of force by him. The inference from defendant's evidence is that Mrs. Boltz carried a razor under her apron from her work station to the place where the cutting occurred. These were matters for resolution and determination by the jury after a proper submission of evidence to it.

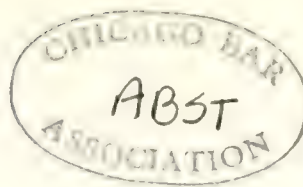
The cases cited by the State in support of its position that the trial court properly ruled in this regard are not in point. In the case of People v. Nation (1966), 73 Ill.App.2d 438, 219 N.E.2d 261, there was no evidence that the defendant acted in self-defense, and the propounded question of whether the defendant was in fear of the victim was therefore properly objected to and the objection properly sustained.

Because of these trial errors, the judgment of conviction must be reversed and a new trial ordered. Therefore, the judgment of the circuit court of Cook County is reversed and the cause remanded for a new trial.

Reversed and remanded.

[ABSTRACT ONLY]





58671

PEOPLE OF THE STATE OF ILLINOIS,)	
	)	APPEAL FROM THE CIRCUIT
Respondent-Appellee,	)	COURT OF COOK COUNTY.
)	
vs.)	
)	
OZARK NESBITT,	)	HON. FRANCIS T. DELANEY,
	)	Presiding.
Petitioner-Appellant.)	

*PER CURIAM (FIRST DISTRICT, FIRST DIVISION):

Ozark Nesbitt, petitioner, appeals the denial of his pro se post-conviction petition after an evidentiary hearing.

Petitioner was charged by two separate indictments with the crimes of murder and aggravated battery. On May 6, 1968, petitioner withdrew his previously entered pleas of not guilty and entered pleas of guilty to both indictments. He was sentenced to a term of 14 years to 14 years and one day on the charge of murder and a term of five years to ten years on the charge of aggravated battery, both sentences to run concurrently. No direct appeal was ever taken.

On August 19, 1969, defendant filed a pro se post-conviction petition under the Post Conviction Hearing Act (Ill.Rev.Stat. 1969, ch.38, par.122-1 et seq.), which was dismissed without an evidentiary hearing. The petition alleged that petitioner's constitutional rights were violated in that he was induced to plead guilty by the representations of his appointed attorney, that he had no possibility of receiving a fair and impartial trial either by a jury or by the court and that as a result of going to trial he would be given either the electric chair or life imprisonment. Petitioner appealed the dismissal of his post-conviction petition and, on April 19, 1972, this court reversed and remanded with directions to proceed with a hearing



on the issues presented in the petition. (People v. Nesbitt, 5 Ill.App.3d 123, 283 N.E.2d 294.) On August 9, 1972, after a full evidentiary hearing, the post-conviction petition was denied.

Petitioner wished to appeal and the public defender was appointed to represent him. After examining the record, the public defender filed a petition in this court for leave to withdraw as appellate counsel pursuant to the requirements set out in Anders v. California, 386 U.S. 738. A brief in support of the petition has also been filed. The brief states in effect that an appeal in this case would be wholly frivolous and without merit. Copies of the petition and brief were mailed to petitioner on June 1, 1973. Petitioner was informed that he had until August 3, 1973, to file any additional points he might choose in support of his appeal. He has not responded.

The petition and brief of the public defender allege that the only possible issue which could be raised on appeal is whether petitioner's plea of guilty was induced through the misrepresentations of his attorney.

At the evidentiary hearing held on August 9, 1972, the following testimony was adduced: Ozark Nesbitt, petitioner, testified that in 1968 he was charged with murder and aggravated battery in two separate indictments. He was originally represented by the public defender's office. He subsequently asked for an attorney other than the public defender and one was appointed to represent him. On May 6, 1968, he entered pleas of guilty to both indictments. Prior to entering the pleas of guilty, his attorney had informed him that he could not do anything for him and if he did not cop out he would get



the chair or life. Petitioner testified that his attorney did not tell him that there was no possibility of receiving a fair and impartial trial.

Roland Cassata, an attorney, testified that he was appointed to represent petitioner. At that time a motion to suppress petitioner's confession had been heard and denied. Counsel interviewed the petitioner, the public defender who had previously been representing petitioner and several witnesses. After counsel's investigation, he informed petitioner that it would be very difficult to successfully defend against the charges of murder and aggravated battery. He also informed petitioner of the probable statutory penalty for murder and that after a trial he would most likely receive a sentence in excess of the 14 year statutory minimum. After a pretrial conference was held, counsel informed petitioner that upon a plea of guilty he would receive a minimum sentence of 14 years to 14 years and one day on the charge of murder and a sentence of five years to ten years on the charge of aggravated battery, both sentences to run concurrently. Counsel testified that he never informed petitioner that he had to plead guilty to these charges and never informed petitioner that he could not get a fair and impartial trial.

Where an evidentiary hearing is held on a post-conviction petition, the credibility of witnesses is a matter for the trial judge to determine and unless it appears that his determination was manifestly erroneous the ruling of the trial judge, who had an opportunity to see and hear each witness, will be upheld.

(People v. Bracey, 51 Ill.2d 514, 283 N.E.2d 685.) In the case at bar, the testimony of petitioner's original trial counsel established that after full investigation of the case he informed petitioner that the case would be extremely difficult to defend



and that after a trial petitioner would probably receive a sentence well in excess of the 14 year statutory minimum on the charge of murder. After plea negotiations, counsel informed petitioner that upon a plea of guilty he would be sentenced to a term of 14 years to 14 years and one day on the charge of murder and five years to ten years on the charge of aggravated battery, both sentences to run concurrently. The fact that petitioner's plea of guilty may have been motivated by the desire to avoid the death penalty or a lengthy prison sentence does not demonstrate that his plea was involuntarily made. (People v. Wilbourn, 48 Ill.2d 187, 268 N.E.2d 418.) The advice petitioner received from his attorney was well within the range of competency and was proper. (People v. Jackson, 47 Ill.2d 344, 265 N.E.2d 622.) Even petitioner's testimony at the post-conviction hearing failed to substantiate the allegations of his post-conviction petition, in that petitioner testified that he was at no time told that he could not receive a fair and impartial trial. We are satisfied that defendant was adequately represented at trial and entered a voluntary and intelligent plea of guilty.

After a full examination of all the proceedings in accordance with the dictates of Anders, we concur in the opinion of the public defender that the point thus raised is not arguable on its merits and that an appeal is wholly frivolous. Our examination of the record does not disclose any additional possible grounds for an appeal which are also not frivolous.

The public defender's motion to withdraw as counsel is allowed and the judgment is affirmed.

JUDGMENT AFFIRMED.

*Mr. Presiding Justice Burke did not participate.

Abstract Only.

14 I.A.³ 385

ABST

57330

JOHN R. PATETE and JENNIE P. PATETE,)	
)	
Plaintiffs-Appellants,	)	APPEAL FROM THE CIRCUIT
)	
vs.	)	COURT OF COOK COUNTY.
)	
FREDERICK BAKER and OAK PARK	)	HONORABLE
NATIONAL BANK, as Trustee under	)	ABRAHAM W. BRUSSELL,
Trust No. 7618,	)	PRESIDING.
)	
Defendants-Appellees.)	

PER CURIAM:

John R. Patete and Jennie P. Patete, plaintiffs, brought an action to recover damages for abuse of legal process. The defendants, Frederick Baker and Oak Park National Bank, as Trustee under Trust No. 7618, motion to dismiss the amended complaint was sustained and the plaintiffs appeal.

The sole issue on appeal is whether the trial court properly dismissed the amended complaint to recover damages for abuse of legal process. The action for abuse of legal process is based on an alleged wrongful eviction in the forcible detainer suit filed as Oak Park National Bank, as trustee, under trust number 7618 vs. John R. Patete and Jennie P. Patete, case number 69M4-10839.

The plaintiffs argue that the amended complaint states a cause of action for abuse of legal process. They also state that the amended complaint has "elements of malicious prosecution as well as abuse of process." The thrust of the amended complaint is that the plaintiff in the forcible detainer action (defendant herein) wrongfully had the trial court issue a writ of restitution thereby causing the plaintiffs herein to be illegally evicted from their home with resulting mental suffering and damage to their personal property.

In order to maintain an action for malicious use of process it is necessary for the complaint to allege the institution and prosecution of judicial proceedings by the defendant; the lack of probable cause for these proceedings; malice in instituting the proceedings; the termination of the prior cause of action in



plaintiffs' favor; and the suffering by plaintiff of damage or injury from the prior proceeding. Holiday Magic, Inc. v. Scott (1972), 4 Ill.App.3d 962, 966, 282 N.E.2d 452; March v. Cacioppo (1962), 37 Ill.App.2d 235, 243, 244-245, 185 N.E.2d 397; Caspers v. Chicago Real Estate Board (1965), 58 Ill.App.2d 113, 117, 206 N.E.2d 787, Petition for Leave to Appeal denied, 32 Ill.2d 625.

To maintain an action for abuse of process the complaint must allege the existence of an ulterior purpose or motive, and some act in the use of the legal process not proper in the regular prosecution of the proceedings. Holiday Magic, Inc. v. Scott (1972), 4 Ill.App.3d 962, 966, 282 N.E.2d 452; March v. Cacioppo (1962), 37 Ill.App.2d 235, 243, 185 N.E.2d 397; Caspers v. Chicago Real Estate Board (1965), 58 Ill.App.2d 113, 120, 206 N.E.2d 787. It has also been held that mental suffering or anguish is generally not an element of the cause of action. March v. Cacioppo (1962), 37 Ill.App.2d 235, 243-244, 185 N.E.2d 397; Caspers v. Chicago Real Estate Board (1965), 58 Ill.App.2d 113, 121, 206 N.E.2d 787.

Where the prior action is terminated by agreement or consent of the parties, an action for malicious use or abuse of process or malicious prosecution will not lie. Briskin v. Briskin Manufacturing Co. (1969), 114 Ill.App.2d 410, 252 N.E.2d 678.

An examination of the record in the forcible detainer proceedings discloses that after the plaintiffs herein were evicted from their home and after they filed a petition in the forcible detainer action to have the plaintiff in the forcible detainer action held in contempt of court for abuse of legal process and for damages for the wrongful and alleged eviction, the parties in said forcible detainer action settled their differences and subsequently had an order entered in the forcible detainer action providing that upon the plaintiffs herein paying the sum of \$7,000 to the defendants herein and after said defendants herein had issued a warranty deed for the premises, the forcible detainer action was to be dismissed. We



are of the opinion that the plaintiffs herein have waived any alleged wrongdoing by the defendants herein in the forcible detainer action and, therefore, it is not necessary for this court to determine if the amended complaint stated a cause of action.

A judgment or decree, like any other written instrument, is to be construed reasonably and as a whole so as to give effect to the apparent intention of the court; and this effect must be given not only to that which is expressed but also to that which is unavoidably and necessarily implied in the judgment or decree. Polk v. Polk (1972), 7 Ill.App.3d 935, 289 N.E.2d 9. The judgment order in the forcible detainer action provided:

"This cause coming on to be heard on the matter on defendants' petition to vacate, and pursuant to order of continuance of November 6, 1970 and defendants presenting cashier's check in the sum of \$7,000.00.

"It is ordered that said cashier's check in the sum of \$7,000.00 be deposited with the Oak Park National Bank and the plaintiffs be required to convey title to the property involved by good and sufficient trustees warranty deed to Carol Jean Patete within thirty days, at this time the said sum shall be released to plaintiffs and the suit and the cause be dismissed."

This order was prepared by the attorney for the plaintiffs herein, who were the defendants in the forcible detainer action. It is clear from the reading of said order that it was the intention of the parties and the trial court in the forcible detainer action that all matters in controversy, including the petition for contempt and damages for the alleged wrongful eviction of the defendants in the forcible detainer action, were to be terminated and dismissed by agreement and with the consent of the parties in said forcible detainer action. Therefore, the plaintiffs cannot now maintain an action for abuse of process or for malicious use of process.

In light of the foregoing, it is not necessary to discuss the other issues raised by the plaintiffs. The trial court

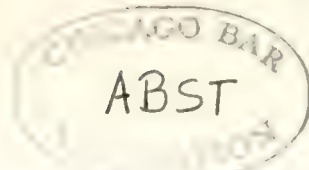


rightfully dismissed the cause of action.

The judgment of the trial court is affirmed.

Judgment affirmed.

Third Division. Justice DEMPSEY did not participate.



No. 57575

PEOPLE OF THE STATE OF ILLINOIS,	)	APPEAL FROM THE
	)	CIRCUIT COURT OF
Plaintiff-Appellee,	)	COOK COUNTY.
)	
vs.)	
)	
ARTHUR ROSTON,	)	HONORABLE
	)	JOHN J. CROWLEY,
Defendant-Appellant.	)	PRESIDING.

MR. JUSTICE MCGLOON delivered the opinion of the court:

Defendant, Arthur Roston, was charged in two separate complaints with theft (Ill.Rev.Stat. 1971, ch.38, par.16-1(a)) and battery (Ill.Rev.Stat. 1971, ch.38, par.12-3). At a bench trial in the circuit court of Cook County, he was found guilty as charged. He was sentenced to one year probation, first six months in the House of Correction for theft, and six months in the House of Correction for battery, the sentences to run concurrently. He appeals.

Defendant contends that the record is devoid of any evidence which shows that he knowingly obtained or exerted unauthorized control over a one dollar bill belonging to the complaining witness as charged in the complaint. Based on this contention, defendant argues that the prosecution did not prove him guilty beyond a reasonable doubt of the crime of theft. His second contention is that, assuming arguendo, the prosecution did carry its burden of proving defendant guilty of theft, it was error to convict the defendant of two crimes which arose out of the same transaction.

We affirm the battery conviction and reverse the theft conviction.

The facts of the case are as follows: At trial the complaining witness, a 19 year old woman, testified that on February 28, 1972, at approximately 9:00 p.m. or 9:15 p.m., she got off the C.T.A. elevated train at the Cicero-Lavergne Avenue stop, which was located in Chicago, and saw a man whom she identified at trial as the defendant. The man approached the complainant, put his arm around her, and tried to make conversation with her. The complainant testified that she told the man to leave her alone. Defendant continued to walk with his arm around her until they arrived at a platform at the

entrance to the station. It was at this point that the defendant pushed the complainant down and got on top of her. The complainant testified that the defendant threatened her that if she did not give him money, he was going to rape her. Complainant falsely responded that she had one hundred dollars in her boot, hoping that this statement would induce the defendant to get off of her. While still on top of her, defendant put his hand in her boot and then on her thigh. She pushed his hand away, but he persisted in asking her for money, and he placed his hand on her crotch. The complainant testified that she had a one dollar bill in her pocket, and that she did not give the defendant permission to take it. She never testified that the defendant took the one dollar bill.

The complainant waved to the bus driver of a passing C.T.A. bus and caught his attention. The bus driver, Robert Cohee, stopped the bus, and when he came to her aid, the defendant released the complainant and fled. Cohee testified that he heard screaming and saw a man, whom he identified at trial as the defendant, tussling with the complainant on the platform. He saw various articles strewn about the ground and decided something was wrong. Cohee further testified that when the defendant fled, he chased him. The defendant was later apprehended by the police.

Roston was the only witness called by the defense. In his testimony he denied taking the one dollar bill which belonged to the complainant. He admitted putting his arm around her and asking her for money. At the close of the evidence, the trial court found defendant guilty as charged and imposed sentence upon him.

The dollar bill which was allegedly taken was not introduced at trial and was not otherwise accounted for. It is defendant's contention that the prosecution failed to prove a material element of a crime of theft, namely, that the defendant obtained or exerted unauthorized control over property of the owner. (Ill. Rev.Stat. 1969, ch.38, par.16-1(a).) Defendant further contends that the prosecution must prove this material element of the offense

beyond a reasonable doubt (Ill.Rev.Stat. 1969, ch.38, par.3-1), and that it did not carry its burden of proof.

The prosecution attempted to elicit proof of theft through the testimony of the complainant. The complainant gave the following testimony relating to the issue of whether the defendant unlawfully took her property:

Q. Now, did you have any money on you?

A. Yes, I did.

Q. How much?

A. One dollar bill.

Q. Where was the dollar bill?

A. It was in my pocket.

Q. What happened to the dollar bill?

THE COURT: Did you give him permission to take that dollar bill?

THE WITNESS: A. No.

Although the testimony indicates that the complainant did not give the defendant permission to take the dollar bill, there was no testimony that the defendant actually took it. In his testimony, the defendant denied taking the dollar bill, and there was no testimony in the record to contradict this. It is evident that the trial court interrupted the prosecution's interrogation of the complainant at a crucial point. The prosecution argues that although the question, referred to above, was never answered and was not pursued at trial, the totality of the complainant's testimony leads to no other conclusion than that the defendant took the dollar bill. The prosecution further argues that assuming there was no direct evidence of an unlawful taking, there was sufficient circumstantial evidence. We find no merit in these arguments.

The complaint which charged defendant with theft was framed in the same language as the statute defining the offense. Ill.Rev.Stat. 1971, ch.38, par.16-1(a) provides in pertinent part:

A person commits theft when he knowingly:

(a) Obtains or exerts unauthorized control over property of the owner, *** and



(1) Intends to deprive the owner permanently of the use or benefit of the property; ***

In a prosecution for theft, the corpus delicti must be established. The prosecution must prove the crime and commission by the accused beyond a reasonable doubt. (People v. Gold (1935), 361 Ill. 23, 196 N.E. 729.) As the prosecution points out, the corpus delicti may be established by circumstantial evidence. (People v. Gawlick (1932), 350 Ill. 359, 183 N.E. 217.) In the instant case this was not done. The prosecution failed to prove beyond a reasonable doubt by either direct or circumstantial evidence that a theft was committed. Therefore, the conviction for theft must be reversed. The cases cited by the prosecution are inapposite.

Because we are reversing the judgment of conviction and sentence for theft, we find it unnecessary to consider defendant's second contention that it was error to convict him of two crimes which arose out of the same transaction.

The judgment of conviction and sentence for battery are affirmed. The judgment of conviction and sentence for theft are reversed.

Judgment affirmed in part;
reversed in part.

Schwartz and McNamara, JJ., concur.





57717

ROBERT LUBURICH,)	
Plaintiff-Appellant,	)	APPEAL FROM THE CIRCUIT
vs.	)	COURT OF COOK COUNTY.
KENNETH SOPHIE,	)	HONORABLE
Defendant-Appellee.	)	MARTIN G. LUKE,
	)	PRESIDING.

PER CURIAM:

Plaintiff, Robert Luburich, has appealed from the April 3, 1972 order granting the defendant's petition under section 72 of the Civil Practice Act to set aside a \$7,500 default judgment entered against the defendant September 2, 1971. Ill.Rev.Stat. 1971, ch.110, par.72. On appeal he argues that the section 72 petition did not show due diligence on the part of the petitioner and that the petition did not show the existence of a meritorious defense to plaintiff's original action.

On October 14, 1970, plaintiff, Robert Luburich, filed a complaint against the defendant, Kenneth Sophie, which sought \$15,000 for damages arising from a November 1, 1968 automobile collision. Summons was personally served on the defendant on October 27, 1970, and on September 2, 1971, judgment in the amount of \$7,500 plus costs was entered. A citation to discover assets was served personally on the defendant on January 25, 1972 and on February 15, 1972, he filed his section 72 petition supported by his affidavit which stated his first notice of the judgment was upon the service of the citation on January 25, 1972, and that when served with summons on October 27, 1970, he forwarded the summons by mail to the law firm of Parillo, Sims and Bresler, agents for Safeway Insurance Company, with whom he had a policy of insurance and that he had "a meritorious defense to this action." Plaintiff moved to strike the petition on April 3, 1972, because it failed to set forth facts showing a meritorious defense and failed to show due diligence on the part of the defendant. On April 3, 1972, the trial court granted the petition and vacated the judgment of September 2, 1971.

While broad equitable considerations govern section 72 petitions, and while the requirement of showing due diligence by the party seeking relief may be relaxed when equity and good conscience require it, it has been held recently that "any such abrogation must be determined on a case by case basis." Kukuk v. Checker Taxi Co. (1st Dist., 5th Div.: June 15, 1973), --Ill.App. 3d--, --N.E.2d--, slip opinion, page 6. In the instant case, petitioner did no more than simply forward the summons served upon him to the attorney for his insurance carrier. This and similar conduct has been held not to be sufficient. Chmielewski v. Marich (1954), 2 Ill.2d 568, 119 N.E.2d 247; Johnson-Olson Floor Coverings v. Branthaver (1968), 94 Ill.App.2d 394, 397, 236 N.E.2d 903. A petition under section 72 is a new proceeding and the petitioner must, as in other civil cases, prove the right to the relief sought. "The burden is upon the petitioner under section 72 to allege and prove the facts justifying relief." Esczuk v. Chicago Transit Authority (1968), 39 Ill.2d 464, 467, 236 N.E.2d 719. A conclusionary statement as we have here, that the petitioner has a meritorious defense to his opponent's case, is not an adequate basis for relief under section 72. Gundersen v. Rainbow Cleaners and Laundry (1966), 77 Ill.App.2d 268, 222 N.E.2d 41. The petition here and the supporting affidavit show neither due diligence on the part of petitioner nor the existence of a meritorious defense. Accordingly, the section 72 relief should not have been granted. The order of the circuit court of Cook County vacating the default judgment is reversed.

Order reversed.

Third Division. Justice SCHWARTZ did not participate.





58432

SADELLE HURWISS d/b/a J. J.)	
HURWISS INSURANCE SERVICE,)	
	)	APPEAL FROM THE CIRCUIT
Plaintiff-Appellee,)	
	)	COURT OF COOK COUNTY.
vs.)	
	)	HONORABLE
FLORENCE SILVER d/b/a 3157	)	JOSEPH B. HERMES,
WASHINGTON BOULEVARD	)	PRESIDING.
CORPORATION,)	
)	
Defendant-Appellant.)	

PER CURIAM:

On December 19, 1968, plaintiff Sadelle Hurwiss d/b/a J. J. Hurwiss Insurance Service sued Florence Silver d/b/a 3157 Washington Boulevard Corporation for insurance premiums allegedly due. Defendant lived in Chicago. The sheriff's return on the summons, which was returnable January 15, 1969, reads:

"I certify that I served the within writ on the within named defendant Florence Silver by leaving a copy thereof with the said defendant personally this 1st day of Jan. 1969.
JOSEPH L. WOODS, Sheriff, by Shields J.M."

On January 15, 1969, a default judgment was entered against defendant in the amount of \$1042.64. An execution was served, according to the sheriff's return, on defendant on February 26, 1969, and returned no property found in May, 1969. On January 11, 1971, a citation to discover assets was issued and on March 30, 1971, May 5, 1971, June 7, 1971, and April 12, 1972, alias citations were issued, the last being the only one able to be served on defendant. Service was had on April 17, 1972.

On April 26, 1972, defendant filed a special and limited appearance and on April 28, 1972, a motion to quash service of summons on the ground that she had never been served with process. The motion to quash was supported by two affidavits of the defendant and one affidavit of her daughter-in-law. In opposition plaintiff filed an answer supported by the affidavits of plaintiff and her attorney. On August 2, 1972,

the motion to quash was overruled and defendant appealed.

It is well settled that the sheriff's return on a summons is prima facie proof of service and can be overcome only by clear and convincing proof, and the return will not be set aside upon the uncorroborated testimony of the party upon whom service purports to have been made. Pyle v. Groth, 15 Ill.App.2d 361, 366, 146 N.E.2d 219, leave to appeal denied 13 Ill.2d 627.

Defendant contends that the presumption of the regularity of the sheriff's return was overcome by clear and convincing evidence. She stated in her affidavits that she had not personally been served with summons returnable on January 15, 1969; that on January 1, 1969, she left her home approximately 9:30 a.m. to return her grandchildren, for whom she had been babysitting, to her daughter-in-law in Glenview, where she stayed until about 9:00 p.m.; that she did not return to her home until after 10:00 p.m. because of a stop she made at her daughter's home in Wilmette and that at no time on January 1, 1969, was she served with any summons or complaint in the matter either prior to 9:30 a.m. or subsequent to 10:00 p.m. Her daughter-in-law stated in her affidavit that she had personal knowledge that defendant was at her (the daughter-in-law's) home in Glenview on January 1, 1969, from approximately 10:00 a.m. to approximately 9:00 p.m.

These affidavits do not constitute the clear and convincing proof necessary to overcome the prima facie proof of service of the sheriff's return.

Even if it be assumed that defendant's daughter-in-law's affidavit is sufficient to corroborate defendant's assertion that she was not home for the greater part of January 1, 1969, there is no direct evidence, apart from defendant's uncorroborated assertion, that she was not served before 9:30 a.m. or after 10:00 p.m. Her uncorroborated assertion is not sufficient to overcome the sheriff's return. Pyle v. Groth,

15 Ill.App.2d 361, 366, 146 N.E.2d 219, leave to appeal denied
13 Ill.2d 627.

Further, the affidavits of plaintiff and her attorney are uncontradicted that on at least 17 occasions in 1969, 1970 and 1971 plaintiff spoke to defendant by telephone and the latter never denied being served and did acknowledge the judgment against her; that less than two months after the judgment was entered plaintiff's attorney talked by telephone with defendant concerning the judgment; that she offered to satisfy the judgment for \$400.00, which was refused; and that defendant named three individuals she claimed should contribute to the payment of the judgment, two of whom told plaintiff's attorney that the defendant had spoken to them of the judgment.

The trial court properly denied defendant's motion to quash the service of summons.

The judgment of the circuit court of Cook County is affirmed.

Judgment affirmed.

Third Division. Justice SCHWARTZ did not participate.

58631



PEOPLE OF THE STATE OF ILLINOIS,)	
)	
Plaintiff-Appellee,	)	Appeal from the Circuit
)	
	)	Court of Cook County.
v.)	
)	
)	
CLARENCE JACKSON,	)	Daniel J. Ryan, J.
)	
Defendant-Appellant.))	

PER CURIAM:

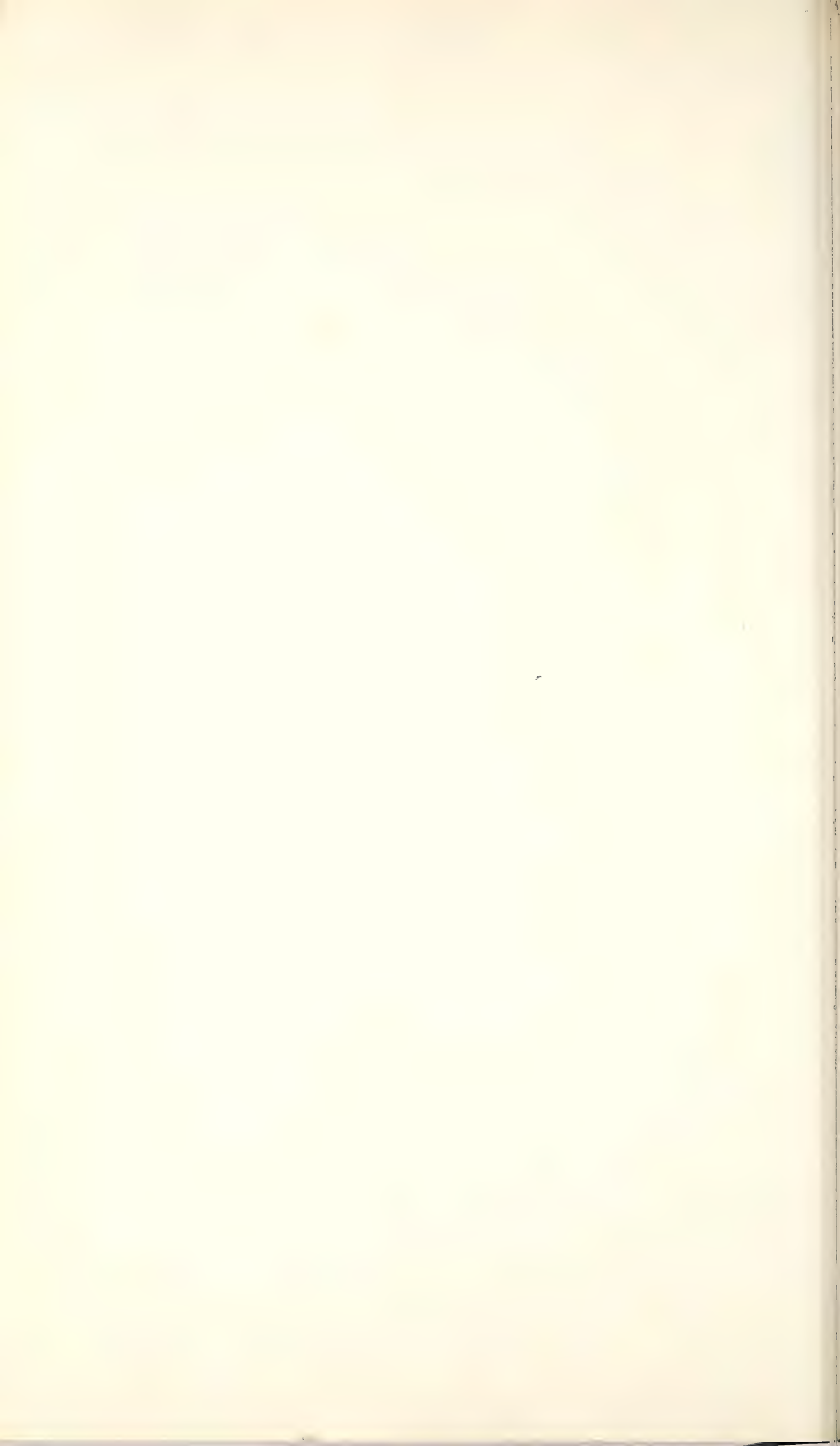
Defendant pleaded guilty on August 20, 1969, to six robbery indictments and was sentenced to not less than eight nor more than eight years and one day on each indictment, the sentences to run concurrently. Ill.Rev.Stat., 1967, ch. 38, para. 18-1. On May 18, 1972, after an evidentiary hearing, defendant's amended petition under the Post-Conviction Hearing Act was denied. Ill. Rev.Stat., 1969, ch. 38, para. 122-1. The public defender of Cook County was appointed to represent the defendant on this appeal, but after examining the record, counsel has filed a petition in this court for leave to withdraw as appellate counsel, pursuant to the requirements of Anders v. California, 386 U.S. 738. As required by Anders, the public defender has filed a brief, which states that the only two claims which could be the basis for the appeal are wholly frivolous and without merit. These two contentions are (1) that the court did not fully admonish the defendant as to the significance and consequences of his change of plea, and (2) that the guilty plea was involuntary in that it was based on an unfulfilled promise of leniency by his attorney. On May 18, 1973,



a copy of the motion and the brief was mailed to the defendant by his counsel. On May 31, 1973, this court additionally advised defendant by mail of the public defender's petition and gave the defendant until July 30, 1973, to file any additional points he might choose in support of his appeal. Defendant has not responded.

At the hearing on the post-conviction petition, the defendant and his wife, Mary Jackson, testified that defendant thought he was going to receive a three to five year sentence when he appeared before the court to plead guilty. His attorney testified that he informed the defendant that the sentence of eight years to eight years and one day was the best he could do for him and was the sentence actually imposed, and that he was satisfied before the case was called that his client knew what sentence he was going to receive before the judge announced it. The judge specifically found from the testimony of these witnesses that the defendant was told he would receive eight to eight and a day and knew he was going to receive that sentence when he pleaded guilty, and denied the petition. In a post-conviction hearing, the credibility of testimony is a matter for the trial judge to determine and his determination and finding will be upheld by the reviewing court unless it is manifestly erroneous. People v. Thomas (1972), 51 Ill.2d 39, 280 N.E.2d 433.

The record of the guilty plea proceeding shows affirmatively that the trial court complied with Supreme Court Rule 401(b),

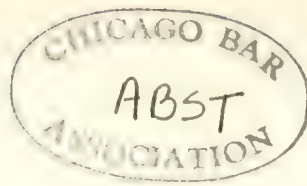


then in effect. Ill.Rev.Stat., 1967, ch. 110A, para. 401(b). The current rule, Supreme Court Rule 402, is not retroactive. People v. Nardi (1971), 48 Ill.2d 211, 268 N.E.2d 389.

After a full examination of the record in accordance with the dictates of Anders, we concur with the appointed counsel that the points raised are not arguable on the merits and that the appeal is wholly frivolous. Our examination of the record does not disclose any additional possible grounds for an appeal. Accordingly, the motion to withdraw is allowed and the judgment of the circuit court of Cook County is affirmed.

MOTION ALLOWED;
JUDGMENT AFFIRMED.

Third Division: Justice Schwartz did not participate.



No. 58928

GLENVIEW STATE BANK,	)	APPEAL FROM THE
	)	CIRCUIT COURT OF
Plaintiff-Appellee,	)	COOK COUNTY
)	
vs.)	
)	
PETER M. JOSEPH and ELLA M. JOSEPH,	)	HONORABLE
	)	WALLACE I. KARGMAN,
Defendants-Appellants.	)	PRESIDING.

MR. JUSTICE LORENZ delivered the opinion of the court:

The instant case comes before us on plaintiff Glenview Bank's motion to dismiss the appeal of defendants Peter M. and Ella M. Joseph regarding plaintiff's replevin of defendants' 1967 Fiat Dino automobile. It appears that a default judgment was entered against defendants on March 15, 1972, and that notice of appeal from a preliminary order entered by the trial court on February 29, 1972, was filed on March 22, 1973. Defendants represent themselves on this appeal.

The record indicates that plaintiff filed a verified complaint in replevin against defendants on February 24, 1972. On February 28, 1972, the court issued a replevin writ and summons with a return day of March 15, 1972. On February 29, 1972, plaintiff appeared in court. The nature of the proceedings in court on that day do not appear in the record, but the following order, which does appear, was entered:

The cause coming on to be heard on Motion of Plaintiff for the entry of an Order authorizing the Sheriff of Cook County to forcibly enter certain premises to effect service of the Writ of Replevin herein & it being represented to the Court that the Defendants refuse to accept service herein & is restraining the service by locking the property involved in the premises, & the Court being fully advised in the premises:

IT IS HEREBY ORDERED:

That the Sheriff of Cook County shall serve the Writ of Replevin herein and seize the property herein by using force if necessary and to effect a forcible entry into the garage at 8125 S. Luella Ave., Chicago, Ill. or any other place where said property may be concealed to effect service herein.

The record next indicates that defendants were served as John Doe and that they failed to appear in court on March 15, 1972. In view of these circumstances the court, apparently after hearing evidence, found:



"that the right to the possession of the property replevied in this cause is in the plaintiff and assesses the plaintiff's damages for the detention thereof while the same was wrongfully detained by the defendants at the sum of one cent." Default judgment was thus entered in the matter on March 15, 1972. Although the record shows that an appearance in the trial court was made by an attorney-at-law, the notice of appeal which was filed in the matter indicates that Peter M. Joseph is representing himself. Moreover, the notice of appeal relates to the order of February 29, 1972, not the judgment of March 15, 1972, and was filed about a year after both, on March 22, 1973.

Defendants filed what purports to be a brief in the case on appeal. It recites numerous facts not of record including allegations relating to the filing of a law suit against plaintiff and unsuccessful negotiations by an attorney on defendants' behalf. The brief cites various U. S. Supreme Court cases regarding procedural due process of law and makes reference, although not by name, the opinion in Fuentes v. Shevin, 407 U.S. 67, which the Supreme Court filed on June 12, 1972, after the instant car was replevied.

Although we took the time to examine all the trial court records in this matter, reviewing courts are limited by the record on appeal before them and bound by law regarding the matters which they may consider. Here, timely notice of appeal was not filed and the notice of appeal which was filed relates to a non-appealable order. For these reasons, we must dismiss the instant appeal.

Appeal dismissed.

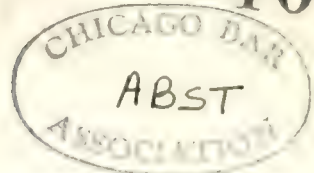
DRUCKER, P.J. and ENGLISH, J., concur.

[PUBLISH ABSTRACT ONLY.]

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57971

LAWRENCE C. BEILFUSS, Administrator)	
of the Estate of LAWRENCE P.)	APPEAL FROM THE
BEILFUSS, Deceased,	)	CIRCUIT COURT
	)	OF COOK COUNTY.
Plaintiff-Appellant,)	
)	
v.)	
	)	HONORABLE
RICHARD VAIA,	)	ALFONSE F. WELLS,
	)	PRESIDING.
Defendant-Appellee.)	

PER CURIAM * (First Division, First District):

Lawrence C. Beilfuss, as administrator of the estate of Lawrence P. Beilfuss, his deceased minor son, brought this action in the circuit court of Cook County against Richard Vaia, the defendant, for the death of his son resulting from an accident when defendant's car allegedly struck Lawrence P. Beilfuss and the bicycle on which he was riding. The trial court entered judgment on the directed verdict and denied plaintiff's post-trial motion, from which plaintiff has appealed, raising the following contentions: (1) three photographs of the vehicles taken shortly after the accident should have been admitted into evidence; (2) the court erred in directing a verdict in favor of the defendant since there was evidence of negligence on the part of the defendant.

Defendant, Richard Vaia, identified Plaintiff's Exhibit 1 as the true picture of Meadowbrook Lane, facing south. Immediately prior to the accident, he made a left turn into Meadowbrook Lane going north at "about ten or fifteen miles per hour," and went "a quarter to a third of a block north." At all times he was looking straight ahead. He saw some children playing in the street a half a block in front of him. There were no cars on either side of the street and there were no obstructions to his vision. He saw a man on

* Mr. Justice Burke did not participate.

the street on the left side waving his arms and shouting something, but he could not hear what the shouting was since his windows were closed because he was using the air conditioning in his car. When he saw the man, he had "a feeling that something was wrong" and stopped in the middle of the street and got out. He walked to the front of his car and observed a small child lying unconscious on the pavement, four feet in front of his automobile, and the child's toy motor bike jammed under the front of his automobile behind the front bumper. He did not see the child, he did not see his bike until he got out of the car and the car was not moved at any time thereafter until the police came. He identified Plaintiff's Exhibit 2 as a true picture of the car he was driving and the toy motor bike the boy was riding as the vehicle stood in the street after the accident. Plaintiff's Exhibit 3 was a true picture of his automobile and the street as it was as the car stood when brought to a stop and Exhibit 4 was a picture of the front of his car with the child's toy motor bike underneath it as it stood where it was stopped following the accident, except that there was a circle drawn on the pavement and an inked "x" on the photograph that marked the point where the little boy's body was lying on the street.

Mrs. Olga Szerlong testified she lived at 6834 Meadowbrook Lane and on July 27, 1967, while "picking weeds" on her front lawn, she saw the Vaia car turn left to go north on Meadowbrook Lane. There were no cars parked on either side of the street and no obstruction to defendant's vision. Defendant's car was going "at a very slow rate of speed." She saw the Beilfuss boy "pull his bike into a driveway" across from where she was working. This driveway leads into the street. The little boy pulled into the driveway,

looking down at his rear wheels and as the car proceeded northward, the boy crossed the driveway at an angle and "shot out into the street and was hit by the front of Mr. Vaia's car."

Hanover Park Police Chief Sam Polotto testified that when he arrived at the scene, the car was in the position and condition depicted in the photographs marked Plaintiff's Exhibits 1, 2, 3, and 4, pictures that were taken by Officer Miller and kept as a part of the police record. At the time of the trial, Officer Miller lived somewhere in Wisconsin.

It was stipulated that the deceased was a normal, male child at the time of the accident on July 27, 1967, that he was five and one-half years of age and there was a causal connection between the injuries suffered at the time and place of the accident and the child's subsequent death on August 2, 1967.

Although the defendant-appellee has not filed either an appearance or a brief in this court, we have considered the merits of the appeal. Daley v. Jack's Tivoli Liquor Lounge, Inc., 118 Ill.App.2d 264, 267, 254 N.E.2d 814.

The apparent basis for the defendant's objection to the admission of Exhibits 2, 3, and 4 is that the person who had actually taken the photographs, Officer Miller, did not testify. However, for such photographs to be admitted, the witness must show only that he had personal knowledge of the scene in question and testify that the photographs correctly portray the scene. (Clauson v. Lake Forest Improvement Trust, 1 Ill.App.3d 1041, 1047, 275 N.E.2d 441.) Since each of the witnesses in this case had personal knowledge of the scene in question and testified that the photographs were accurate representations of the scene, the photographs should have been admitted.



The general rule governing directed verdicts, as set forth in the leading case of Pedrick v. Peoria & Eastern R.R. Co., 37 Ill.2d 494, 510, 229 N.E.2d 504, is that they should be entered only in those cases in which "all of the evidence, when viewed in its aspect most favorable to the opponent, so overwhelmingly favors movant that no contrary verdict based on that evidence could ever stand." In the case at bar, the defendant admitted he did not see the child or the vehicle on which the child was riding, although the view was unobstructed. While in Illinois a child under seven years of age is "conclusively presumed incapable of contributory negligence" (Dickeson v. B & O Chicago Terminal R.R. Co., 42 Ill.2d 103, 106-107, 245 N.E.2d 762), there was also testimony that the boy's vehicle "shot out" in front of the defendant's vehicle. This presented a question of fact as to defendant's negligence. Negligence ordinarily is a question of fact and the resolution of whether the defendant should have seen the child should have been left to the jury to determine. Accordingly, the judgment of the circuit court of Cook County is reversed and the cause remanded for a new trial.

REVERSED AND REMANDED.

ABSTRACT ONLY.



58260

PEOPLE OF THE STATE OF ILLINOIS,)	
)	
Respondent-Appellee,	)	APPEAL FROM THE CIRCUIT
	)	COURT OF COOK COUNTY.
v.)	
)	
EDDIE JENKINS,	)	HONORABLE LOUIS WEXLER,
	)	Presiding.
Petitioner-Appellant.)	

PER CURIAM * (First Division, First District):

Eddie Jenkins, petitioner, appeals from the trial court's dismissal of his pro se post-conviction petition filed under the Illinois Post-Conviction Hearing Act (Ill.Rev.Stat. 1971, ch. 38, par. 122-1 et seq), without an evidentiary hearing.

Petitioner was charged by indictment with the crime of aggravated battery. On February 2, 1970, petitioner entered a plea of guilty to the indictment and was sentenced to a term of three to eight years. No direct appeal of that conviction was taken. On May 5, 1972, petitioner filed a pro se post-conviction petition. On September 11, 1972, upon motion of the State, the pro se post-conviction petition was dismissed without an evidentiary hearing.

Petitioner wished to appeal and the public defender was appointed to represent him. After examining the record, the public defender filed a petition in this court for leave to withdraw as appellate counsel, pursuant to the requirements set out in Anders v. California, 386 U.S. 738. A brief in support of the petition has also been filed. The brief states in effect that an appeal in this case would be wholly frivolous and without merit. Petitioner was mailed copies of the petition and brief on June 1, 1973. Petitioner was informed that he had until August 6, 1973, to file any additional points he might choose in support of his appeal. He has not responded.

* Mr. Presiding Justice Burke did not participate.



The petition and brief of the public defender allege that the only possible issue which could be raised on appeal is whether petitioner was denied an evidentiary hearing on the allegation in his pro se post-conviction petition that his plea of guilty was induced through the misrepresentations of the Assistant State's Attorney. In his pro se post-conviction petition, petitioner alleged that the Assistant State's Attorney, on several court dates, represented to the court that the complaining witness was still hospitalized when in fact the complaining witness was not hospitalized. Petitioner alleges that the complainant never appeared in court and that petitioner was forced to forego a jury trial and enter a plea of guilty because the conduct of the State's Attorney deprived him of his right to confront the witness against him.

In the case at bar, the transcript of petitioner's plea of guilty, which was entered prior to the adoption of Supreme Court Rule 402 (Ill.Rev.Stat. 1971, ch. 110A, par. 402), demonstrates that the plea of guilty was voluntarily and intelligently made under the then prevailing law. A voluntary plea of guilty waives the right to have evidence or witnesses presented. (People v. Myers, 52 Ill.2d 258, 287 N.E.2d 672.) Petitioner's allegation regarding the failure of the complaining witness to appear in court was waived by his voluntary plea of guilty and does not present a constitutional issue under the Illinois Post-Conviction Hearing Act. People v. Williams, 52 Ill.2d 466, 288 N.E.2d 353.

Further, we have noted that the transcript of petitioner's plea of guilty demonstrates that the complaining witness was present in open court at that time. After the hearing in aggravation and mitigation, the trial judge made the following statement: "It is a serious charge, and looking at the complaining witness, who is there in a wheel chair * * * ." This

statement by the trial judge demonstrates that the complaining witness was present in open court at the time petitioner entered his plea of guilty and contradicts the allegation in the pro se post-conviction petition that the complaining witness never appeared in court. The trial court properly dismissed the pro se post-conviction petition without an evidentiary hearing.

After a full examination of all of the proceedings in accordance with the dictates of Anders, we concur in the opinion of the public defender that the point thus raised is not arguable on its merits and that an appeal is wholly frivolous. Our examination of the record does not disclose any additional possible grounds for an appeal which are also not frivolous.

The public defender's motion for leave to withdraw as counsel is allowed and the judgment of the circuit court of Cook County is affirmed.

MOTION ALLOWED;
JUDGMENT AFFIRMED.

ABSTRACT ONLY.



57713

PEOPLE OF THE STATE OF ILLINOIS,	)	APPEAL FROM THE
Plaintiff-Appellee,	)	CIRCUIT COURT OF
	)	COOK COUNTY
v.)	
	)	HONORABLE
ROBERT DAUGHERTY and JOHN SZWEBEL,	)	THOMAS R. CASEY, JR.,
Defendants-Appellants.	)	JUDGE PRESIDING.

PER CURIAM * (FIRST DISTRICT, SECOND DIVISION):

John Szwebel and Robert Daugherty, defendants, were charged with battery and theft. After a bench trial, each was found not guilty of theft and guilty of battery (Ill.Rev. Stat. 1971, ch. 38, par. 12-3) and sentenced to six months at the Illinois State Farm at Vandalia. They appeal, contending that they were not found guilty of battery beyond a reasonable doubt.

Louis Martin, the complaining witness, testified: On Monday, December 20, 1971, about 7:30 P.M., he met the defendants Szwebel and Daugherty on South State Street. The complaining witness had the Christmas spirit and asked them if they would like to stay at the Carter Hotel, where he stayed. He paid for rooms, one for the defendants and one for himself. Then he gave Daugherty \$10 to buy hamburgers and cigarettes. He went upstairs to his room; the other two men went to their room. He never spent any time in his room with either of the two men, never had conversations or talked to either of them; he did not have any drinks with them; he did not try to have sex with defendant Szwebel.

Defendants came back later that night and knocked at his (the complaining witness') door after midnight. He was in bed. When he opened the door, Szwebel hit him between the eyes and knocked him down. He was struck about eight times, two, three or four times in rapid succession, with a wooden

stick with a protruding screw. He called for help; defendant Szwebel told him if he didn't shut up he would beat him to death. The complaining witness did not hit either of the defendants; he didn't raise a hand, except to protect his head.

He had \$149 with him in his wallet, which was in his pocket. After he was hit, he saw his wallet being removed by Daugherty from his pocket. He was taken to the hospital. He has scars both on the right and left side of his forehead.

Brian Reagen, an investigator for the police department, testified: He was assigned to investigate a robbery. He got to the hotel at approximately one o'clock and entered Mr. Martin's room. When asked, "When you went into the room did you see any evidence of any alcohol present?" he replied, "I vaguely recall there was a can...it might have been a can, I couldn't positively say." The bed appeared to be in disarray, as if maybe somebody had been sleeping on the bed. He went to the next door room where the two defendants had registered; he did not believe there were any bed covers on the bed in that room; it did not appear to him that anybody had been sleeping in that bed.

Defendant John W. Szwebel testified: He is 19 years old. On December 21, 1971, he was with defendant Daugherty; he met him in the afternoon; he had known Daugherty since he was about 16 years old. They met the complaining witness at the Garrick Restaurant. Szwebel had met the complaining witness about two years before. He introduced him to Daugherty. They all had a cup of coffee and then the complaining witness wanted to get a room somewhere. The complaining witness paid for two rooms. He went to his room; Szwebel and Daugherty went into the other room. They decided to go talk to the complaining witness, who had given them about \$10 to get some beer and hamburgers. They brought in the hamburgers and the beer.



Each had a couple of cans in the complaining witness' room. The defendants wanted to go to their room. The complaining witness decided he wanted to talk to defendant Szwebel. Then the complaining witness started messing around with defendant Szwebel sexually. Szwebel said he just didn't like this stuff, so the complaining witness started facing defendant Szwebel down. Szwebel did not call for help from Daugherty. Szwebel hit the complaining witness in the jaw with his fist. Szwebel happened to see the club on the floor, picked it up and hit the complaining witness about three times in the head. Then defendant Daugherty came into the room and stopped defendant Szwebel and said, "Let's get the hell out of here." Nobody took the complaining witness' money.

Defendant Robert Daugherty testified: On the evening of December 20 he was with Szwebel and the complaining witness at the Carter Hotel. The latter had given Szwebel \$10 for beer and sandwiches. Defendant Daugherty went out and got a six pack of beer and sandwiches; the three of them drank two beers apiece and ate the sandwiches and talked for awhile. Daugherty was tired and went to his room. After two or three hours he woke up and heard defendant Szwebel talking, saying, you can't do this; he heard scuffling, so he went there. When he opened the door, Szwebel had a club in his hand. Daugherty took the club away from him and threw it on the floor and said, "Let's leave." There was no robbery involved.

In a bench trial, it is the duty of the trial judge to determine the credibility of witnesses and the weight to be given to their testimony. Only where the evidence is so unsatisfactory as to leave a reasonable doubt of the defendant's guilt will the finding of the trial judge be disturbed. People v. Catlett, 48 Ill.2d 56, 286 N.E.2d 378; People v. Harwell,

8 Ill.App.3d 275, 290 N.E.2d 366; People v. Wooden, 9 Ill. App.3d 310, 292 N.E.2d 236.

Here, the testimony of the complaining witness was sufficient, if believed, to find both defendants guilty of battery beyond a reasonable doubt.

Section 12-3 of the Criminal Code provides (Ill.Rev. Stat. 1971, ch. 38, par. 12-3):

(a) A person commits battery if he intentionally or knowingly without legal justification and by any means, (1) causes bodily harm to an individual or (2) makes physical contact of an insulting or provoking nature with an individual.

The complaining witness testified that both defendants came back later that night and knocked at his door after midnight. When he opened it, defendant Szwebel hit him several times, two, three or four times in rapid succession, with a wooden club and knocked him down. The blows left scars. By its finding of guilty, the trial court evidenced its belief in the testimony of the complaining witness that the attack was unprovoked on his part and its disbelief in the claim of the defendant Szwebel that he was acting in self-defense. The acts testified to by the complaining witness constituted battery within the statute (Ill.Rev.Stat. 1971, ch. 38, par. 12-3). It cannot be said that the evidence was so unsatisfactory as to leave a reasonable doubt as to defendant Szwebel's guilt.

As to defendant Daugherty, the complaining witness testified that after the defendants knocked on the door and defendant Szwebel started beating him, defendant Daugherty went through the complaining witness' clothes. This evidence establishes beyond a reasonable doubt Daugherty's participation in a common plan and makes him accountable for the conduct of his co-defendant Szwebel. (Ill.Rev.Stat. 1971, ch. 38, par. 5-2). See People v. Wooden, 9 Ill.App.3d 310, 292 N.E.2d 236,



where this court affirmed a conviction for battery under the accountability section, saying (9 Ill.App.3d at 312):

The evidence, taken as a whole, establishes beyond a reasonable doubt defendant's participation in a common plan, thus making his guilt equal to that of another who may have assumed a more active role. (People v. Norfleet, 4 Ill.App.3d 758.) * * *

The evidence was sufficient to prove Daugherty guilty beyond a reasonable doubt.

The judgments of the circuit court of Cook County finding the defendants Szwebel and Daugherty guilty of battery are affirmed.

JUDGMENTS AFFIRMED.

* STAMOS, P.J., did not participate.

Abstract Only.

14 I.A.³ 445

ABST

57473

PEOPLE OF THE STATE OF ILLINOIS,)	
)	
Plaintiff-Appellee,	)	APPEAL FROM THE CIRCUIT
	)	COURT OF COOK COUNTY.
vs.)	
)	
HARVEY O. WRIGHT,	)	Hon. James M. Bailey,
	)	Presiding.
Defendant-Appellant.)	

Mr. JUSTICE GOLDBERG delivered the opinion of the court:

Harvey O. Wright (defendant) was indicted for the murder of his wife. (Ill.Rev.Stat. 1969, ch.38, par.9-1.) After a bench trial, he was found guilty of voluntary manslaughter and sentenced to four to 12 years in the penitentiary. He appeals.

In this court, defendant raises no issue regarding sufficiency of the evidence to prove his guilt of voluntary manslaughter beyond a reasonable doubt. He contends that the court erred in denying his motion to strike the testimony of the only eyewitness for the State; or, alternatively, for mistrial, where the list of witnesses furnished by the State recited an erroneous address for this witness and the court erred in rejecting a defense offer of proof of an attack upon defendant by the deceased at a previous time. The State responds that the motion to strike the testimony, made after completion of cross-examination of the witness, was properly denied and that the court correctly excluded the testimony regarding the previous incident which was intended to support defendant's claim of self-defense.

The evidence shows that on April 29, 1971, deceased visited a tavern with her sister. The sister testified that defendant entered the place and sat down with them. After a time, deceased and defendant went outside together. In a short while, the sister followed and saw defendant seize the deceased by the arm. Deceased pulled away and started to walk back to the tavern.

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Defendant fired a shot at her. She continued toward the door and defendant then immediately ran up behind her, put the gun to her head and fired the fatal shot.

Aside from investigating police officers, the only other witness for the State was a coroner's physician. He testified that postmortem examination of the body showed that deceased had been shot twice in the head. There were powder burns around the entry wound caused by one bullet, showing that the gun had been held a very short distance from the head, less than 18 inches. Also, the position of this entry wound behind the right ear of the victim showed that the person who fired the shot must have been one step behind her.

As regards the first contention of defendant, his counsel filed an itemized motion for discovery on August 5, 1971. On August 11, 1971, in response, the State listed its witnesses including the sister of deceased whose address was stated as "4149 South Michigan, Chicago, Illinois." On August 23, 1971, at a preliminary hearing, the State's Attorney informed the court that it would be necessary to bring the sister back from Mississippi. The case came up for trial on August 25, 1971. At that time, the State's Attorney announced that he was ready and that the lady brought in from Mississippi was present. Defendant's attorney was silent with reference to the address of this witness. The witness testified on direct and also on cross-examination. She was subjected to a careful and thorough cross-examination which covered more than 50 pages of the Report of Proceedings. The direct examination of the witness was accomplished in some nine pages.

At the conclusion of the cross-examination, counsel for defendant pointed out to the court that the address for the sister, contained in the list of witnesses furnished by the State, reflected a Chicago residency but actually, as the State well knew, she was a resident of Mississippi during all of that time and

that defense counsel had made numerous efforts to locate her for discussion but was unable so to do. Defendant's counsel moved to strike the testimony of the witness for that reason. The court denied the motion. We find no motion for mistrial in the record.

The Illinois Code of Criminal Procedure provides that on motion of a defendant the court is to order the State to furnish a list of prosecution witnesses and their last known addresses. (Ill.Rev.Stat. 1971, ch.38, par.114-9(a).) The rules of the Supreme Court similarly provide for the State, upon motion of defendant, to disclose the names and last known addresses of its witnesses. (Ill.Rev.Stat. 1971, ch.110A, par.412(a)(i).) Reviewing courts of Illinois have consistently held that discretion is vested in the trial courts in the administration of this rule. For example, it is a matter "***within the discretion of the trial court to allow a witness to testify even though his name is not on the list of witnesses furnished to the defendant***." (People v. Gonzales, 107 Ill.App.2d 44, 53, 245 N.E. 2d 791.) In addition, as a corollary to this principle, our courts have repeatedly held that the discretion thus vested in the trial court "***will not be reviewed unless it appears that the defendant has sustained the burden of showing surprise or prejudice." People v. Brown, 125 Ill.App.2d 336, 345, 261 N.E. 2d 11.

The record before us shows that defendant did not bring this matter to the attention of the court until after completion of the cross-examination. He heard in open court three days before trial commenced that this witness would have to be brought in from Mississippi. Yet, he made no request for an opportunity to interview the witness before direct examination. Furthermore,



it appears that trial counsel for defendant subjected the witness to a thorough and complete cross-examination. At one point during the cross-examination, a recess was taken and counsel for defendant was furnished copies of the testimony of the witness before the grand jury and her statement to the police. Even then, no request for further time before renewing the cross-examination was made. We conclude that the court acted properly in denying defendant's motion to strike the testimony of the witness.

Defendant's reliance upon cases such as People v. White, 123 Ill.App.2d 102, 259 N.E.2d 357 cannot assist him. In White, for example, defense counsel was given a list of 17 additional witnesses while selecting the jury. He made immediate objection which this court held was well taken.

The next issue raised by defendant is concerned with evidence allegedly tending to prove self-defense. On cross-examination of the sister of deceased, counsel for defendant asked if she was present at an incident in defendant's apartment about 18 months prior, with Johnny Wright, a brother of defendant, at which time she and deceased attempted to stab defendant and the deceased had stabbed the defendant with a butcher knife. The witness responded that she did not remember such incident. She testified that she had tried to stab defendant upon another occasion.

At the commencement of defendant's case, he made an offer of proof during the testimony of his brother, Tommy Wright, to the effect that this prosecution witness told him in the presence of deceased that she had attempted to stab defendant. This conversation occurred about one and one half years ago in defendant's home when defendant was present. Defendant also offered to prove that Johnny Wright, brother of defendant, would testify that,

approximately a year and one half before trial, he was present when there was an argument between defendant and the deceased as a result of which the deceased stabbed the defendant with a knife. The trial court ruled that this testimony by defendant's brothers should be excluded for lack of relevance and materiality and because it was too far removed and was thus only collateral.

In this regard, the record shows that, prior to the commencement of defendant's case, his counsel stated that the evidence would show that defendant killed his wife in self-defense while she was attempting to assault him with a knife. Defendant then called his brother, Tommy, and his brother, Johnny, as witnesses and made the detailed offers of proof above described. Defendant then testified in his own behalf that on the day in question he saw the deceased and her sister in the tavern in the company of another man. They remained there drinking for about two hours. Defendant and his wife then left; and, while standing outside the door, the sister and the other man also came out. An argument then ensued as a result of which the deceased, her sister and their male companion all pulled out knives. Defendant stated that he backed up, pulled out his gun and fired into the ground. At that time the sister of deceased began to walk behind him. Defendant backed away until he was some six or seven feet from the deceased. As she also started toward him, he stepped back off the sidewalk and into a little hole as a result of which he stumbled and the gun was discharged without his aiming. He did not know where the deceased was shot.

In situations of this type where the defendant relies upon self-defense and where "****evidence has been introduced from which the jury could believe that the deceased was the assailant, then evidence concerning the violent temper and disposition of



the deceased and his prior threats to the defendant is admissible as tending to show the circumstances confronting the defendant, the extent of his apparent danger, and the motive by which he was influenced." (People v. Stombaugh, 52 Ill.2d 130, 139, 284 N.E.2d 640.) Under this principle, it would have been proper for defendant to offer the testimony of Tommy Wright and Johnny Wright only if he had first introduced proper foundation evidence regarding self-defense from which the trier of fact could believe that "the deceased was the assailant." The State first argues that when the evidence of these two witnesses was offered, this foundation had not been laid; the evidence was not subsequently reoffered and therefore it was properly excluded. The factual premise upon which this argument rests is correct. When defendant's brothers Tommy and Johnny testified, there had been no previous evidence regarding aggression by the deceased and their testimony was never reoffered. There is authority holding specifically that, in this situation, evidence of previous acts of aggression by the deceased against the defendant was properly excluded. See People v. Conley, 3 Ill.App.3d 75, 80, 81, 278 N.E.2d 806, citing People v. Terrell, 262 Ill. 138, 143, 104 N.E. 264.

However, since no specific objection was made at trial regarding the self-defense foundation when the evidence was first offered and the trial judge sustained the general objection on the ground of remoteness, defendant's trial counsel was thus not alerted to this point. Since he might have remedied this defect, we should give the matter additional consideration. As further analysis will demonstrate, we need not depend upon this principle urged by the People to affirm the judgment. The offers of proof presented by defendant's counsel were full and complete and were put into the record in question and answer form since no jury

was present. The record shows that the court gave careful attention to this evidence and commented upon it. There was no cross-examination by the State's Attorney so that the court heard all of this evidence presented in its most effective form. Therefore, we should not be concerned with whether the offers of proof were made before or after the testimony of defendant. The theory of accidental defense having been advanced by defendant's own testimony, the trial judge was compelled to weigh all of defendant's testimony against the entire balance of the record.

Defendant's version is completely contradicted by the physical evidence regarding the position of the wound upon the head of deceased, which demonstrates that defendant was behind her when he shot, and by the presence of powder burns, showing his close proximity when he fired the fatal shot. In this regard, it must be conceded that the evidence of the prosecution is indeed overwhelming.

The trier of fact could well conclude that the remoteness of the rejected evidence prevented it from creating a reasonable doubt as against the strong evidence presented by the State. Thus, reviewing and considering the rejected evidence we conclude that it would not alter the result reached by the trial court. The ruling of the trial judge in rejecting it, even if erroneous, was harmless error.

We find no prejudicial error in this record and the judgment appealed from is accordingly affirmed.

JUDGMENT AFFIRMED.

EGAN, J., and HALLETT, J., concur.

ABST

57353

PEOPLE OF THE STATE OF ILLINOIS,)	
)	
Respondent-Appellee,	)	APPEAL FROM THE
	)	CIRCUIT COURT
vs.	)	OF COOK COUNTY.
)	
ROBERT HARRIS,	)	HONORABLE
	)	MEL R. JIGANTI,
Petitioner-Appellant.	)	PRESIDING.

PER CURIAM:*

Robert Harris, petitioner, entered pleas of guilty to two charges of armed robbery and was sentenced to terms of two years to three years, to be served concurrently with sentences previously imposed on other convictions. (It does not appear whether petitioner filed a direct appeal from the judgments of conviction here involved.) Petitioner subsequently filed a pro se petition pursuant to the Illinois Post-Conviction Hearing Act alleging a violation of certain of his constitutional rights. (Ill. Rev. Stat. 1969, ch. 38, par. 122 et seq.) The unamended petition was dismissed without an evidentiary hearing upon motion of the State, and petitioner's appeal to the Illinois Supreme Court from the dismissal of the petition was subsequently transferred to this court.

The lengthy but scholarly pro se post-conviction petition alleged that the trial court which accepted petitioner's pleas of guilty had no jurisdiction to act in the matter since the indictments to which the pleas were allegedly entered (numbers 68-1020 and 68-1022) had been nolle prossed by another judge prior thereto; that the pleas of guilty were induced and coerced by malicious prosecution and also by prejudice and misconduct on the part of court personnel; that the time limitation set by the four term act had run prior to the entry of the pleas; and that the indictments were defective in failing to allege the time and place of the offenses.

As to the initial contention, that the trial court lacked jurisdiction to entertain petitioner's pleas of guilty because the indictments upon which the pleas were entered had been nolle prossed by another judge prior thereto, the half sheets kept by the trial court as to those indictments (which were made a part of the instant record on appeal) reveal that no such action was taken as to either of those indictments. On the contrary, neither the judge who petitioner alleges entered the orders of nolle prosequi nor the dates on which those orders were allegedly entered, appear of record on those half sheets. The petitioner's contention is therefore without merit and the cases cited by him in support thereof are inapplicable. See People v. Watson, 394 Ill. 177, 68 N.E.2d 265; see also People v. Reed, 33 Ill.2d 535, 213 N.E.2d 278.

With respect to the contentions that petitioner was improperly induced and coerced into pleading guilty, the record shows that at the time he entered the pleas he was asked by the trial court whether anyone was forcing him to enter the pleas, to which he replied in the negative. If petitioner was being coerced, as he now contends, he had sufficient opportunity to so indicate at that time. People v. Huff, 45 Ill.2d 186, 189, 258 N.E.2d 356.

His allegation that the time limitation set by the four term act had run at the time he entered the pleas is obviated by the fact that he pleaded guilty and that a plea of guilty under such circumstances waives any error in that regard. People v. Hickman, 3 Ill.App.3d 919, 930, 280 N.E.2d 787. Finally, the allegation that the indictments were defective is an unsupported allegation and does not therefore raise a question of a violation of petitioner's constitutional rights. People v. Jewett, 4 Ill. App.3d 738, 281 N.E.2d 693.



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Under the circumstances, the circuit court of Cook County properly allowed the People's motion to dismiss the post-conviction petition. The judgment is affirmed.

JUDGMENT AFFIRMED.

* FIRST DISTRICT, SECOND DIVISION
STAMOS, P.J., did not participate.

ABST

57612

PEOPLE OF THE STATE OF ILLINOIS,)	
)	
Plaintiff-Appellee,	)	APPEAL FROM THE
	)	CIRCUIT COURT
vs.	)	OF COOK COUNTY.
)	
CORNELIUS BROWN,	)	HONORABLE
	)	JAMES M. BAILEY,
Defendant-Appellant.	)	PRESIDING.

PER CURIAM*

Defendant was charged by indictment with aggravated battery in violation of section 12-4 of the Criminal Code (Ill. Rev. Stat. 1969, ch. 38, par. 12-4). After a jury trial, defendant was found guilty and sentenced to a term of two to six years. On appeal, defendant contends (1) that he was denied a fair trial when the State failed to provide arrest records of prosecution witnesses as requested in pre-trial discovery motions; (2) that the trial court erred when it refused to allow defendant to impeach a prosecution witness with his prior arrest record; (3) that the trial court erred when it permitted the State to introduce evidence of other offenses; (4) that the State's closing argument was inflammatory and prejudicial; and (5) that the evidence was insufficient to support his conviction beyond a reasonable doubt.

At trial, the following evidence was adduced: Donna Warner testified that she had known the defendant, Cornelius Brown, since November, 1968, in Portland, Oregon. She had lived with defendant in Oregon as husband and wife until February, 1971, and had worked as a prostitute for him during that time. Defendant was her pimp. Between February, 1971, and March 31, 1971, she did not see defendant. During that time she was living at 728 W. Barry, Chicago, Illinois, with her son, Guy Lee Warner, age four. In the late evening hours of March 31, 1971, she was in her apartment with her

son and the manager of the apartment house, Lois Jones, when defendant came to the door. Shortly after defendant was admitted, Lois Jones left the apartment. Defendant then stated that she was going to pay for the days he spent in jail. Defendant left and returned approximately 15 minutes later with the police. Defendant told the police that Miss Warner had narcotics in her apartment. The police searched Miss Warner's apartment but did not find any narcotics. She was taken to the station and was released the following morning. When Miss Warner returned to her apartment, she found defendant, Diane Riley, and her son in the apartment. Defendant slapped Miss Warner and stated that she was going to pay for every day he spent in jail and she was going to work the streets for him. Miss Warner refused. Defendant remained in the apartment and on April 2nd, he again slapped Miss Warner and tried to choke her. On April 3, 1971, Miss Warner left the apartment with Diane Riley to go to the defendant's sister's house to pick up his clothing. Defendant kept Miss Warner's son in the apartment with him. Miss Warner returned to the apartment at approximately 12:00 noon and defendant started kicking her. Defendant continued to kick her between 12:00 noon and 5:00 P.M. As defendant was kicking her, he stated that she was going to pay for all the time he spent in jail and she was going to work the streets for him. In the late afternoon, Lois Jones came into the apartment and Miss Warner asked her for help. Mrs. Jones left the apartment and returned a short time later, asking defendant if Miss Warner could come downstairs and help her make a salad. Defendant replied "yes" and Miss Warner left the apartment with Mrs. Jones. Mrs. Jones helped her down the stairs and put her into a cab. Miss Warner went to the garage where Mr. Albert Sauls worked. Mr. Sauls called the police. The police took Miss Warner to Henrotin Hospital where she stayed for approximately two weeks.

When Miss Warner regained consciousness, approximately one week after entering the hospital, her ribs were sore and she had a large scar across her stomach. On approximately April 10, the defendant telephoned Miss Warner in the hospital and told her not to press charges against him or her son would be coming home in a box. Miss Warner did not see her son again until August 19th.

Lois Jones testified that in April, 1971, she was the resident manager at 728 W. Barry, Chicago, Illinois. On March 31, 1971, she was present when defendant entered Miss Warner's apartment. Shortly thereafter, she left the apartment. On April 2nd she entered Miss Warner's apartment and observed bruises on the side of Miss Warner's neck and Miss Warner's eyes were red, as if she had been crying. On April 3rd she again went to Miss Warner's apartment and observed Miss Warner with further bruises on her neck and body. She left the apartment and returned a short time later, asking if Miss Warner could come down and help her make a salad. She left the apartment with Miss Warner, who was stooped over and could hardly walk. She helped Miss Warner into a cab and sent her to Mr. Sauls. Shortly after Miss Warner left, defendant came downstairs looking for her. When Mrs. Jones told defendant she did not know the whereabouts of Miss Warner, defendant said, "If I ever catch that bitch again I will kill her."

Albert Sauls testified that on April 3, 1971, Miss Warner came to the garage where he was working. Miss Warner got out of the cab and then collapsed. He took her inside and then called the police, who immediately transported her to the hospital.

John Kelly, a Chicago Police officer, testified that on April 3, 1971, in the late afternoon, he responded to a call and met Mr. Sauls. After a short conversation, he entered the garage and observed the complainant slumped over. He observed numerous bruises on her body and had her transported to Henrotin Hospital.



John Burzinski, a Chicago Police investigator, testified that he was assigned as the investigator of the assault upon Miss Warner. As a result of this investigation, he obtained a warrant for aggravated battery against defendant. On August 19, 1971, he accompanied Miss Warner to O'Hare airport and met a flight from Kansas City, Missouri, which carried Miss Warner's son, Guy Lee Warner. On August 20, he flew to Kansas City, Missouri and returned on August 24, 1971, with defendant in custody.

Dr. John Belmonte, Jr. testified that on April 3, 1971, he examined Miss Warner in the emergency room of Henrotin Hospital. His examination revealed that she was in shock, had multiple contusions, two fractured ribs, bruises of the chest and abdomen and back. She was also suffering from interior abdominal hemorrhaging due to a blood trauma to the abdomen. An emergency operation was performed. He testified that the injuries were caused by blunt blows to the abdomen which had occurred in the previous 24 hours.

Diane Triplett, formerly Diane Riley, testified for the defense that she had known defendant for approximately one year and had worked for him as a prostitute. Defendant was in jail in February and March of 1971. When defendant returned home, he started looking for Donna Warner because she had turned him in to the authorities. She testified that on April 1 and April 2, 1971, both she and Donna Warner worked as prostitutes for defendant. On April 3, 1971, she was in the apartment with Miss Warner and defendant. Defendant at that time slapped Miss Warner three or four times across the face. She left the room and heard several more slaps. Shortly thereafter, she came back into the room and saw Miss Warner, who did not complain of any injuries. Defendant left the apartment and Miss Warner told her that she was working for Albert Sauls, who had previously beaten her. Miss

Warner then left the apartment. On April 5, 1971, the witness went to Kansas City with the defendant and Guy Lee Warner. On October 3, 1971, she had a conversation with Miss Warner at 728 W. Barry, Chicago, Illinois. Mrs. Triplett's mother and sisters were present. Miss Warner stated that she had pressed charges against defendant because she wanted her son back. On August 19, 1971, she had a conversation with Investigator Burzinski and stated that she observed defendant slap Miss Warner but denied that she ever said that she observed defendant kick Miss Warner.

Cornelius Brown, defendant, stated that he had been employed as a pimp for a number of years. Donna Warner had worked for him as a prostitute. Defendant had fled from Oregon to California to Chicago to Brooklyn and back to Chicago because he was running from the FBI. He was arrested in February, 1971. Upon his release, he came back to the City of Chicago and at the end of March, 1971, found Miss Warner living with Albert Sauls. He denied that he kicked or punched Miss Warner in the stomach or chest area on April 3, 1971. On April 3, 1971, Miss Warner told him that Albert Sauls had beat her and had made her work the streets. He stated that he did slap her in the face on that date. Shortly thereafter, defendant moved to Kansas City, Missouri, and, upon finding out that Miss Warner was in the hospital, he telephoned her and asked about the kidnapping charge. He stated that if she continued with those lies she was not going to get her son back.

Molly Bandaly, the mother of Diane Triplett, testified that on October 3, 1971, she was at 728 W. Barry with Diane Triplett, Susan Bandaly and Donna Warner. At that time, Diane Triplett stated that Donna was thrown around and knocked around the room by defendant.

Susan Bandaly, the sister of Diane Triplett, testified that on October 3, 1971, she was present with her mother, sister, and

Donna Warner at 728 W. Barry, Chicago, Illinois. Diane Triplett stated that defendant had slapped Miss Warner around and knocked her around the room.

Donna Warner testified that on April 1 and April 2, 1971, she did not work as a prostitute.

Albert Sauls testified that he has never been a pimp and was never a pimp for Donna Warner.

John Burzinski testified that in August, 1971, he had a conversation with Diane Triplett, who said that on April 3, 1971, she had witnessed defendant kicking Donna Warner. Mrs. Triplett stated that she had returned from Kansas City because the defendant had beaten her very severely.

Defendant first argues that he was denied his right to a fair trial when the State failed to provide the arrest records of all prosecution witnesses prior to trial in response to a discovery motion. In defendant's discovery motion, he did not ask for the arrest records of each witness but asked only for prior criminal records to be used for impeachment. The motion read:

"8. Prior criminal records of State's witnesses to be used for impeachment."

This motion was in accord with Supreme Court Rule 412 which states that in response to a defendant's written motion, the State shall furnish (Ill. Rev. Stat. 1971, ch. 110A, par. 412(a)(VI)):

"Any record of prior criminal convictions which may be used for impeachment of persons whom the State intends to call as witnesses at the hearing or trial."

The Committee Comments to this section make it clear that this section ". . . is limited to prior convictions which may be used for impeachment purposes in Illinois." Since the defendant in his discovery motion did not ask for prior arrest records he cannot now argue that it was error not to be furnished with them.

Defendant next argues that the trial court erred when it refused to allow defense counsel to impeach the testimony of

Albert Sauls with evidence that Mr. Sauls had been arrested on March 2, 1971, for being in the company of a loitering prostitute. It is the general rule that a witness may be impeached only by a prior conviction of an infamous crime. People v. Mason, 28 Ill. 2d 396, 192 N.E.2d 835. A witness' prior arrest may be shown or inquired into only where it would reasonably tend to indicate that his testimony might be influenced by interest, bias or motive to testify falsely. People v. Barr, 51 Ill.2d 50, 280 N.E.2d 708.

In the case at bar, defense counsel was informed that Mr. Sauls had been arrested on two occasions. One of the arrests occurred March 2, 1971, when Mr. Sauls was arrested for being in the company of a loitering prostitute. Defense counsel was also informed that Miss Warner was not arrested on that date. On cross-examination, defense counsel asked Mr. Sauls if he had occasion to be arrested with Miss Warner. Mr. Sauls replied "no". The trial court then instructed the jury to disregard the entire line of questioning. Prior to asking the above questions, defense counsel knew that Mr. Sauls had not been arrested with Miss Warner. The fact that Mr. Sauls may have been arrested in the company of a loitering prostitute does not in any way demonstrate interest, bias or a motive to testify falsely. The trial court properly ruled that Mr. Sauls could not be impeached by a prior arrest unrelated to the case at bar.

Defendant's third contention is that the trial court erred when it permitted the State to introduce testimony that the defendant had struck Miss Warner on April 1st and April 2nd. Illinois courts have long recognized an exception to the general rule that evidence of the commission of other crimes by the accused, although ordinarily inadmissible, is permitted if relevant to establish identity, intent, knowledge, motive, a common scheme or design or a fact material to the issue on trial. People v. Holland, ___ Ill.App.3d ___, ___ N.E.2d ___ (No. 56085, decided April 12,

1973); People v. Scott, 100 Ill.App.2d 473, 241 N.E.2d 579.

In the case at bar, all three attacks upon Miss Warner were committed by the defendant due to his anger for Miss Warner for having turned him into the police and in an attempt to get her to work the streets for him. All three instances were closely related in time and demonstrate the general scheme of defendant's course of conduct toward Miss Warner. As such, the testimony regarding incidents on April 1st and April 2nd was properly admitted into evidence by the trial court. People v. Holland, ___ Ill.App.3d ___, ___ N.E.2d ___ (No. 56085, decided April 12, 1973).

Defendant's fourth contention is that the closing argument of the assistant State's attorney was improper. Defendant points to two incidents in the closing argument which he contends deprived him of a fair trial: first, the assistant State's attorney argued that the defense attorney had raised many side issues deliberately trying to confuse the jury; second, the assistant State's attorney stated that if the defendant were found not guilty, he would go back out onto the streets and find another girl and do the same thing again. Where a defendant argues that the prosecutor's closing argument was improper, a reversal is not warranted unless it appears that the prosecutor so influenced the jury that the defendant was substantially prejudiced. People v. Weaver, 7 Ill.App.3d 1104, 288 N.E.2d 669; People v. Smith, 6 Ill.App.3d 259, 285 N.E.2d 460. A careful review of the entire closing argument discloses that, although the prosecutor in a few instances may have transcended the bounds of legitimate argument, the defendant was not substantially prejudiced. Considering all the evidence adduced in the case at bar, the prosecutor's comments were not so prejudicial as to deny defendant a fair trial.

Defendant's final contention is that the evidence did not

establish his guilt beyond a reasonable doubt. It is well settled that it is the function of the jury to weigh testimony, judge the credibility of witnesses and determine factual matters. A court of review will not substitute its judgment for that of the jury nor disturb the finding of guilty unless the evidence is so contrary to the manifest weight of the evidence. People v. Hampton, 44 Ill.2d 41, 253 N.E.2d 355; People v. Holmes, 6 Ill. App.3d 254, 285 N.E.2d 566. In the case at bar, the jury heard all the evidence and found the defendant guilty beyond a reasonable doubt. Their finding is amply supported by the evidence.

For the foregoing reasons, the judgment of the circuit court of Cook County is affirmed.

JUDGMENT AFFIRMED.

* FIRST DISTRICT, SECOND DIVISION
STAMOS, P.J., did not participate.

57298

PEOPLE OF THE STATE OF ILLINOIS,

Plaintiff-Appellee,

vs.

FRANK CHARLESTON (Impleaded),

Defendant-Appellant.

APPEAL FROM THE
CIRCUIT COURT OF
COOK COUNTY

HON. SAUL A. EPTON,
JUDGE PRESIDING.

MR. PRESIDING JUSTICE BURMAN delivered the opinion of the court.

Frank Charleston, the defendant, was charged by indictment with murder, aggravated kidnapping, attempted deviate sexual assault, attempted rape and armed robbery. When his case came on for trial on February 22, 1971, he pleaded guilty to all five charges. After a hearing in aggravation and mitigation the court sentenced him to not less than 35 nor more than 99 years in the penitentiary on each of the murder, aggravated kidnapping and armed robbery charges and not less than five nor more than ten years in the penitentiary on each of the attempted rape and attempted deviate sexual assault charges. The court further ordered that all sentences run concurrently.

The sole issue on appeal is whether the trial court's admonition to the defendant prior to its acceptance of his guilty pleas was sufficient to comply with the requirements of Supreme Court Rule 402. (Ill.Rev.Stat.1970, ch. 110A, par.402.) In contending that the admonition was insufficient the defendant argues that the court failed to inform him adequately of the nature of the charges to which he was pleading guilty, failed to inform him specifically that he had a right to plead not guilty and failed to inform him specifically that if he pleaded guilty there would be no trial of any kind and he would waive the right to confront the witnesses against him.



Supreme Court Rule 402 requires that in hearings on guilty pleas there be substantial compliance with its provisions. It is generally conceded that there are no magic words which automatically insure substantial compliance with the rule, but that the circumstances of each case must be examined to determine whether the defendant in fact understood the consequences of his plea. That the defendant is not admonished as to each and every consequence of a guilty plea does not, in and of itself, establish that he is unaware of the consequences of such a plea. (People v. Mendoza, 48 Ill.2d 371; People v. Warship, 6 Ill.App.3d 461.)

The record in the present case reveals that the court did not admonish the defendant as to every consequence of pleading guilty. However, we are satisfied that the defendant was sufficiently informed to have made his pleas knowingly.

Prior to pleading guilty, the defendant expressed a desire to waive trial by jury. The court admonished him that he had a right to a jury trial and questioned him as to the nature and function of a jury. It also ascertained that the waiver was voluntary and not in return for any promise. Following the jury waiver the defendant expressed a desire to plead guilty. The court admonished him as to the maximum and minimum sentences which he could receive on each charge and that the sentences imposed could be either concurrent or consecutive. It also informed him that there had been a plea negotiation between his counsel and the State's Attorney and that because of this it was probable that the sentence would be 35 to 99 years on the murder charge with all other sentences to run concurrently. The defendant stated that he understood this and that after discussing the matter in detail with his counsel he desired to plead guilty.

The defendant was informed as to the offenses to which he was pleading and the sentences which he could receive on each. He knew that there had been a plea negotiation and that a specific sentence had been agreed upon. In short, he knew precisely what would happen to him as a result of pleading guilty and he entered his pleas in reliance on this knowledge. Under these circumstances we would be hard pressed to say that they were not knowingly made.

For these reasons the judgment of the Circuit Court of Cook County is affirmed.

AFFIRMED.

DIERINGER AND JOHNSON, JJ.,

CONCUR.

(Abstract only)



57419

PEOPLE OF THE STATE OF ILLINOIS,

Plaintiff-Appellee,

vs.

FLOYD D. LOVE,

Defendant-Appellant.

) APPEAL FROM THE
) CIRCUIT COURT OF
) COOK COUNTY) HON. MARVIN ASPEN,
) JUDGE PRESIDING.

MR. PRESIDING JUSTICE BURMAN delivered the opinion of the court.

The defendant, Floyd D. Love, was charged with burglary. After a bench trial the court found him guilty as charged and sentenced him to three years probation. It imposed the condition that the first year be spent in the House of Correction under the provisions of the day and work release program, and the defendant appealed.

The sole issue on appeal is whether the court abused its discretion in requiring the defendant to spend the first year of his probation in the work release program.

Briefly summarized, the facts are as follows. On October 27, 1971, John Ferro, a resident of Bellwood, Illinois, notified police that his home had been broken into and two television sets taken. Shortly thereafter a Bellwood police officer observed a white Cadillac automobile in an alley about one-half block from the scene of the burglary. A console television was protruding from its trunk. The officer stopped the car, and as he did so, two of its three occupants fled. The driver, who was the defendant, did not attempt flight and was arrested. The television and another found in the car were taken to the Bellwood Police Station where they were identified by Mr. Ferro as those taken from his home.

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At the hearing in aggravation and mitigation it was brought out that the defendant was 20 years old and had no prior criminal record. He had a good work record and contributed to the support of his mother and seven brothers and sisters. He came from a stable home, attended church and was about to be married. He co-operated with police in the investigation of the case. Prior to sentencing he was free on bond, and he attended each court session regularly.

On appeal the defendant contends that in light of the above facts the requirement that he spend the first year of his probation in the work release program is harsh and excessive. He argues that incarceration will work a hardship on his wife and family and will be of no benefit to society. This argument has some appeal. However, we have carefully reviewed the record and find no grounds upon which to modify the sentence imposed by the trial court.

The power of a reviewing court to modify sentences is limited to those cases in which the trial court in imposing sentence manifestly abuses its discretion. (People v. Collins, 7 Ill.App. 3d 947; People v. Clark, 130 Ill.App.2d 558.) It is a power to be used with caution. (People v. Taylor, 33 Ill. 2d 417.) In the present case the sentence imposed by the trial court was well within the limits set by the statute. (Ill.Rev.Stat.1969, ch. 38, par. 19-1.) Compared to the maximum sentence allowable it was extremely lenient and was such that it took into account the mitigating circumstances in the defendant's background and his obligation to his family. Under these circumstances we cannot say that the trial court abused its discretion and we must affirm the sentence.

AFFIRMED.

ADESKO AND JOHNSON, JJ.,

CONCUR.

(Abstract only)



APPEAL FROM
CIRCUIT COURT,
COOK COUNTY.

HONORABLE
LOUIS B. GARIPPO,
PRESIDING.

Defendant-Appellant.

The defendant entered a plea of guilty to robbery and was sentenced to a minimum of two and a maximum of five years in the Illinois State Penitentiary. He appeals, contending that the sentence imposed is in violation of the Unified Code of Corrections in that the minimum sentence exceeds one-third of the maximum term set by the court.

On February 24, 1972, defendant was charged with two counts of armed robbery. He pleaded guilty to robbery and was sentenced to the penitentiary for a term of two to five years. The defendant filed a notice of appeal and the public defender was appointed counsel to represent him.

The public defender has filed a motion for leave to withdraw, supported by a brief pursuant to Anders v. California (1967), 386 U.S. 738, in which he alleges that the only basis for appeal would be whether the trial court fully admonished the defendant according to Supreme Court Rule 402 before accepting the guilty plea. The brief states that the court did adhere to the applicable statute, and that it did not commit error in accepting the appellant's plea of guilty.

Defendant was served with copies of the motion and brief and given additional time within which to file any points he might choose in support of his appeal. Defendant filed a supplemental brief which alleges that the sentence does not conform to the Unified Code of Corrections.



An examination of the record shows that the trial judge substantially complied with the requirements of Supreme Court Rule 402 and we agree with the public defender that an appeal on this ground would be without merit. Therefore, the motion to withdraw is allowed under the Anders case.

The defendant's supplemental brief, however, has substantial merit. He contends that the sentence imposed is in violation of the Unified Code of Corrections in that the minimum sentence exceeds one-third of the maximum term set by the court. The Unified Code of Corrections, Ill. Rev. Stat. 1972 Supp., ch. 38, par. 1008-2-4, states that if the offense being prosecuted has not reached the sentencing stage or a final adjudication, then for purposes of sentencing the sentences under this Act apply if they are less than under the prior law upon which the prosecution was commenced. Since case law states that there is no final adjudication until after the direct appeal is finalized, the defendant comes under the Code. People v. Harvey (1973), 53 Ill.2d 585, 294 N.E.2d 269.

Under the Unified Code of Corrections, par. 1005-8-1, robbery is a Class 2 felony, the maximum term to be in excess of one year not exceeding 20 years (Ill. Rev. Stat. 1972 Supp., ch. 38, par. 1005-8-1(b)(3)), and for a Class 2 felony, the minimum term shall be one year unless the court, having regard to the nature and circumstances of the offense and the history and character of defendant, sets a higher minimum term, which shall not be greater than one-third of the maximum term set in that case by the court. Ill. Rev. Stat. 1972 Supp., ch. 38, par. 1005-8-1(c)(3).

The minimum in the present case was two years. It is not one-third of the five year maximum. Under the Code, the minimum should be one year and eight months. The minimum sentence of two years is reduced to one year and eight months

pursuant to authority conferred upon this court by Supreme Court Rule 615 (People v. Hundley (1972), 8 Ill. App.3d 71, 289 N.E.2d 49.) The maximum sentence is unchanged. As modified, the sentence is affirmed and this cause is remanded to the circuit court of Cook County with directions to cause an amended mittimus to issue. People v. Howell (1973), 9 Ill. App.3d 779, 293 N.E.2d 18.

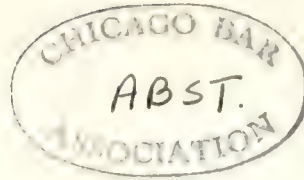
JUDGMENT AFFIRMED, SENTENCE
MODIFIED, AND CAUSE REMANDED.

BURMAN, P.J. and ADESKO, J., concur.

Abstract Only.



57897

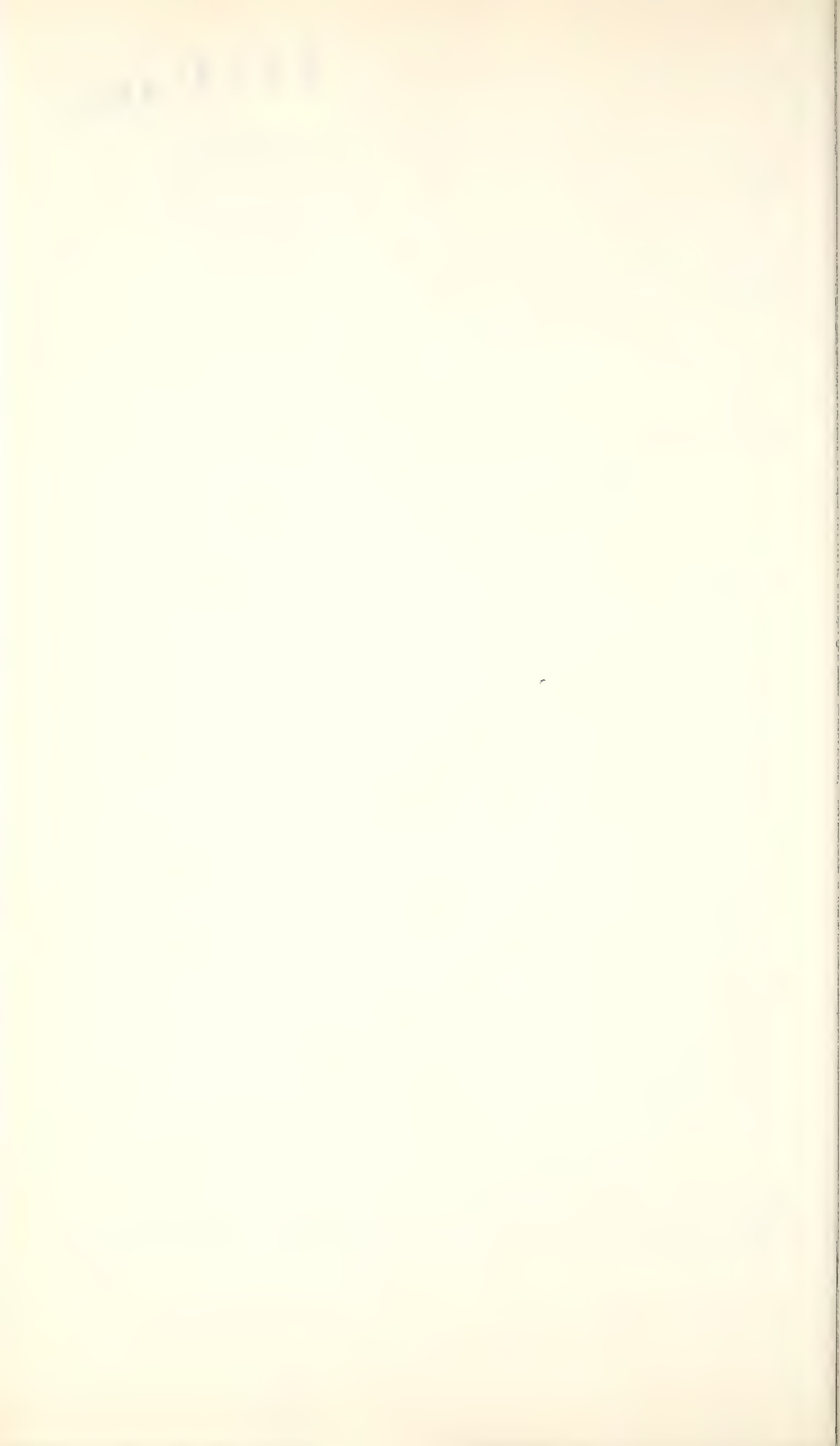


PEOPLE OF THE STATE OF ILLINOIS,)	
)	
Plaintiff-Appellee,)	
)	
v.	)	Appeal from the Circuit
)	
	)	Court of Cook County.
)	
MICHAEL MOORE,)	
	)	Thomas P. Cawley, J.
Defendant-Appellant.))	

PER CURIAM:

Criminal complaints were filed against defendant charging him with unlawful use of weapons, namely, carrying a concealed weapon and with failure to possess a State of Illinois firearm owner's identification card. Ill.Rev.Stat., 1971, ch. 38, paras. 24-1(a)(4) and 83-2. He was also charged with failure to register a firearm with the City of Chicago. City of Chicago Municipal Code, ch. 11.1, sec. 11.1-7 (amended 1/27/71). Defendant was found guilty after a bench trial as charged in the complaints, and he was sentenced to concurrent terms of six months at the Illinois State Farm at Vandalia on the unlawful use of weapons and the lack of State firearm identification violations and was also fined the sum of \$100 on the City firearm registration violation. Defendant appeals all three convictions.

Substantially the same evidence was adduced at a hearing on a motion to suppress evidence as was adduced at the trial of the matter Chicago Police Officer Curtis Jones testified



that he and his partner were cruising in a police car at about 11:15 p.m. on June 29, 1972, when he observed the defendant and two other men walking in a westerly direction in the 3400 block of West 16th Street. When the officer first saw the defendant, the latter was carrying nothing observable, but when the police vehicle was about 15 to 20 feet from the defendant, the defendant ducked into a doorway where the officer observed him removing a shotgun from inside his pants and beneath his jacket. (The officer demonstrated to the court at trial the manner in which he observed the defendant remove the weapon from his clothing.) When the defendant ducked into the doorway, the two officers alighted from their vehicle; the witness observed the defendant remove the shotgun from his clothing as noted above and lay it on the ground; the witness apprehended the defendant as he left the doorway; and the witness' partner recovered the shotgun. The defendant was placed under arrest and a search of his person revealed neither a State of Illinois owner's identification card nor a City of Chicago firearm registration card.

Defendant testified that he knew nothing of the shotgun; that on the night in question he was called over to the police vehicle; and that one of the officers alighted from the vehicle and recovered the shotgun from a doorway. He denied having possession of the weapon.

Defendant initially contends that the State failed to prove his guilt of the offense of carrying a concealed weapon since the State's evidence was merely that Officer Jones either observed the



defendant taking the shotgun from his pants or that he observed defendant laying the shotgun on the ground, neither of which circumstances constitute evidence of the concealment of the weapon.

On the contrary, the officer further testified that he did not see the weapon in the defendant's possession when he first observed the defendant walking on the street, and that the officer also thereafter observed the defendant removing the shotgun from inside his pants and beneath his jacket. The trier of fact was presented with sufficient evidence from which it could find that the shotgun was concealed when the defendant was first observed by the officer and that the defendant thereafter attempted to discard the weapon after seeing the police; the evidence as to the concealment of the weapon is not so unsatisfactory as to leave a reasonable doubt as to his guilt. (People v. Hampton, 44 Ill.2d 41, 253 N.E.2d 385.)

The cases cited by the defendant in support of his contention in this regard are inapposite on their facts. See e.g., People v. Crachy, 131 Ill.App.2d 402, 268 N.E.2d 467; People v. Gant, 84 Ill. App.2d 208, 228 N.E.2d 582.

Defendant further contends that he did not knowingly and understandingly waive his right to a trial by jury, arguing that the court allowed only a "short time" for a discussion of the charges between the defense counsel and the defendant and that the charges against him were altered by the prosecutor but the public defender nonetheless entered pleas of "not guilty, jury waived" thereto without a re-conference with defendant.



The record reveals that the trial court appointed the public defender as defense counsel and immediately passed the case so that counsel could confer with the defendant. When the case was re-called, there being no indication in the record that the lapse of time was "a short time" as argued by defendant on appeal, the prosecutor represented to the court that the State wished to strike a felony charge and add a misdemeanor charge, defense counsel stated that he was aware of the proposed changes, and it was brought out that defense counsel had been tendered a copy of the new charge. Defense counsel then stated to the court that defendant was ready for trial, that he was entering a plea of not guilty, and that he was waiving a trial by jury.

The record shows that the defendant was allowed an opportunity to confer with his counsel immediately upon appointment of counsel. As noted in People v. Sailor, 43 Ill.2d 256, 253 N.E.2d 397, there was a conference between the defendant and his counsel, and the representation of defense counsel to the trial court that defendant was waiving his right to a jury trial was looked on by the court of review as a statement emanating from defense counsel's professional responsibility to the court and his client. Likewise in the instant case, defense counsel knew of the prosecutor's proposed changes in the charges before the matter was recalled, and it may likewise be concluded as in Sailor that such matters were also included in counsel's conference with the defendant. Further, the fact that defense counsel in the instant case was appointed, whereas defense

counsel in the Sailor case was privately retained, is of no matter under the circumstances. See People v. Gay, 4 Ill.App.3d 652, 281 N.E.2d 738, which distinguishes the case of People v. Baker, 126 Ill.App.2d 1, 262 N.E.2d 7, relied upon by defendant in support of his contention in this regard. In the Baker case and in People v. Boyd, 5 Ill.App.3d 980, 284 N.E.2d 699, also relied on by defendant, no opportunity was permitted for a conference between court appointed counsel and the respective defendants; such opportunity was afforded the defendant in the instant matter.

Defendant finally contends that it was improper to convict and sentence him for all three offenses since they allegedly arose out of the same conduct, namely, that of his possession of the shotgun.

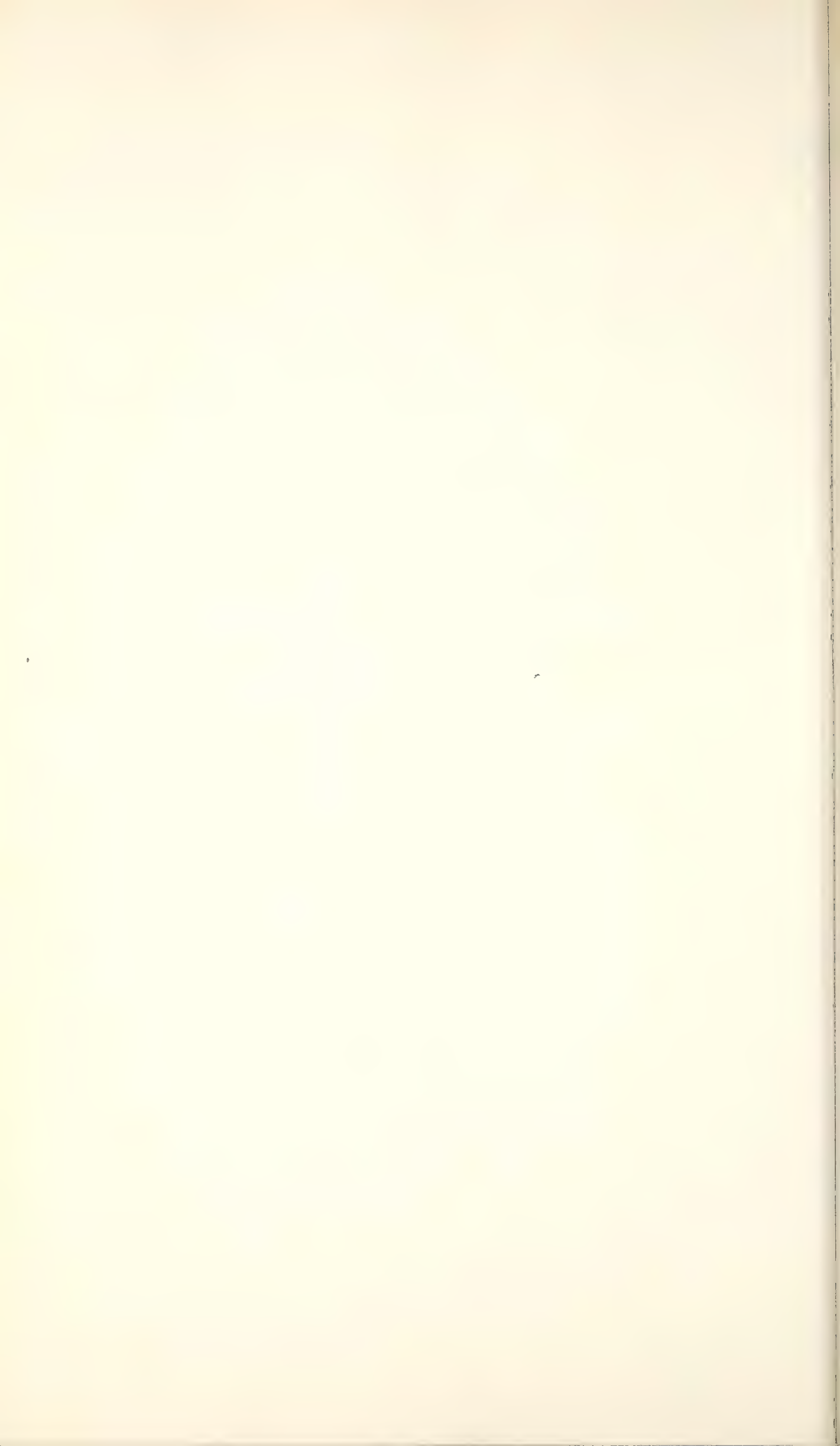
The offenses of which the defendant was found guilty may have possessed the common factor of the possession of a weapon, but in all other respects the elements of the offenses were separate and distinct. Not only did defendant possess the shotgun in question, which required the additional possession of both State and City owner's identification and firearm registration cards, respectively, but the evidence also revealed that he concealed the weapon in violation of the unlawful use of weapons statute. The objectives of the State statute and of the City ordinance, requiring the registration of firearm owners and of firearms, respectively, substantially differ (Brown v. City of Chicago, 42 Ill.2d 501, 250 N.E.2d 129), and the concealment of a firearm clearly has no bearing on whether that firearm, or its owner, has been registered.



It is conceded that the State did not prove that the defendant purchased the shotgun more than ten days prior to his arrest, the grace period afforded by the City of Chicago Municipal Code. But the State is not required to make such proof. Section 7 of chapter 11.1 of the Municipal Code reads:

"Every person after purchasing or otherwise acquiring a firearm from any person other than a firearms dealer licensed by the City of Chicago under this Code, shall, within 10 days of the purchase or other acquisition, provide the City Collector with the information stipulated in Section 11.1-8 of this Chapter on a registration form designed or approved by the City Collector. The burden of proving any firearm was acquired within such 10-day period shall be upon the person charged with failure to register such firearm."

The validity of the provision that the defendant go forward with the evidence that he had purchased the weapon within ten days of the arrest has been upheld in City of Chicago v. Franklin, 126 Ill.App.2d 43, 261 N.E.2d 506, and City of Chicago v. Dowdell, 126 Ill.App.2d 58, 261 N.E.2d 499. Those cases hold that once the fact of a failure to register a firearm has been established, the burden of going forward with evidence that he falls within the ten-day grace period falls upon the defendant. In the instant case, the State established a prima facie case that the defendant failed to register the shotgun; no firearm registration card was found on his person at the time he possessed the gun, as is required by section 8 of chapter 11.1 of the Municipal Code. (City of Chicago, Municipal Code, ch. 11.1, sec. 11.1-8.)



The burden was then upon the defendant, rather than the State, to go forward with the evidence. The defendant presented no evidence that he came within the ten-day exclusion and his conviction for that violation must stand.

For these reasons, the judgments of conviction of the Circuit Court of Cook County are affirmed.

Judgments affirmed.

Third Division: Justice Schwartz did not participate.



ABST

57582

PEOPLE OF THE STATE OF ILLINOIS,	)	APPEAL FROM CIRCUIT
	)	COURT OF COOK COUNTY.
Plaintiff-Appellee,)	
)	
v.)	
)	
PAUL J. SCHARLE,	)	HONORABLE
	)	FRANCIS W. GLOWACKI,
Defendant-Appellant.)	)	PRESIDING.

MR. PRESIDING JUSTICE DRUCKER delivered the opinion of the court:

After a bench trial the defendant was convicted of the offense of driving while under the influence of intoxicating liquor (Ill. Rev. Stat. 1969, ch. 95-1/2, par. 11-501) and was fined \$100 and costs. On appeal he raises two issues: (1) whether the State sustained its burden of proving that defendant was under the influence of intoxicating liquor at the time of the offense; and (2) whether the trial court erred in receiving into evidence statements made by defendant to the arresting officer despite the fact he was not advised of his rights pursuant to the prescriptions of Miranda v. Arizona, 384 U. S. 436.

The evidence in this case consisted solely of the testimony of the arresting officer and that of defendant.¹

Testimony of Corporal R. Johnson of the State Police:

On January 29, 1971, at about 8:40 P.M., he was parked in his police car on Algonquin Road investigating an accident unrelated to this case. The roadway though wet was clear and free from ice and snow. Parked across the street from him was a tow truck. Though he was unsure whether the tow truck had its flasher equipment in operation, his emergency flasher lights were operating. Defendant approached the police car, pounded on the windows, used profanity and told him to be about his business; defendant then

1. This reconstruction of the trial testimony given in the case at bar is based upon the "Proposed Transcript of Proceedings" which is found in the praecipe record. We were not provided with a verbatim transcript of the proceedings below.

crossed the roadway, entered his vehicle and drove off in an erratic manner. The witness backed up and blocked the passage of defendant's vehicle with his own.

He approached defendant's motor vehicle and found defendant slumped over the steering wheel. When defendant exited his vehicle, he stumbled and in his attempts at walking, turning and balancing, he was falling. The witness also noted the odor of alcohol and that defendant's breath was "strong." Defendant's clothing was covered with vomit and spit; defendant's speech was slurred and he was insulting to the officer and once again used profanity. After he had been transported to the police station, defendant was slow and unsure in picking up coins and passing them to the officer. Defendant "did not take any tests or perform any prescribed tests." It was his opinion, based upon his experience and the number of arrests he had made, that defendant was operating a motor vehicle while under the influence of alcoholic beverages.

Testimony of Defendant:

He worked on the day in question and his work involved the use of chemicals; the chemicals had a strong odor which permeated the fabric of his clothing. However, he had changed his clothes after finishing work.

After work he proceeded to a restaurant where he had a beer before his dinner and a beer with his dinner. After finishing several cups of coffee, he left the restaurant and proceeded on Algonquin Road towards his home. The condition of the pavement was slick and there were patches of snow on the roadway. He noticed blinking and flashing lights and when he attempted to slow down, he slid into an embankment. The impact of this collision rendered him temporarily unconscious. Dizziness and nausea also resulted from the impact. This temporary illness was attended with vomiting.



He denied being under the influence of any alcoholic beverage and indicated that the odor emanating from his clothing and person came from chemicals employed in his trade rather than from intoxicants.

He denied having approached the vehicle of the police officer and testified that his first knowledge of the officer's presence came when the officer approached his car.

He introduced into evidence a bill for repairs to his automobile which he claimed had been damaged in the accident.

Opinion

Defendant argues that the State failed to prove him guilty beyond a reasonable doubt. He cites People v. Jordan, 4 Ill.2d 155, 163, 122 N.E.2d 209, for the proposition that if a defendant's story is uncontradicted and is neither so improbable nor so unreasonable or remarkable as to seem incredible, then it may not be rejected. Though we find no fault with this statement of the law, it is not applicable to the instant facts. Defendant apparently believes that his testimony that his bizarre behavior was solely the result of an automobile mishap on a slippery highway was uncontroverted. Clearly, however, the State introduced evidence to the contrary. Officer Johnson attested to defendant's abusive conduct in his first meeting with him, his subsequent erratic driving, the vomit and spit on his clothing, his physical instability, his continued defiant behavior when he got out of his car, his slurred speech, and the smell of alcohol. Although no scientific tests were taken, none was required in the presence of sufficient other evidence.² People v. Casa, 113 Ill. App.2d 1, 251 N.E.2d 290. There was no error in the court below upon hearing

2. Defendant's arrest took place before the implementation of the implied consent provisions of our motor vehicle code. (Ill. Rev. Stat. 1969, ch. 95-1/2, par. 11-501.1.)



the opinion of the arresting officer based upon his observations and taking cognizance of the interest of defendant in the outcome of the case (see People v. Jendrzek, 98 Ill. App.2d 313, 240 N.E.2d 239) finding defendant guilty beyond a reasonable doubt.

Defendant questions whether the State had demonstrated that the arresting officer possessed sufficient expertise so as to be qualified to conclude that defendant was under the influence of intoxicating liquor. We need merely note that defendant failed to object to the officer's testimony on this matter at trial and it is therefore inappropriate for him to raise the issue at this time. Furthermore, observations of this nature are within the competence of all adults of normal experience. People v. Bobczyk, 343 Ill. App. 504, 99 N.E.2d 567. In addition the officer testified that his conclusion was based upon observations in making arrests for the identical offense.

Defendant also claims error due to the admission into evidence of his extra-judicial statements despite the absence of Miranda warnings. The arresting officer admitted that he failed to advise defendant of his rights after placing him under arrest. The record indicates that approximately 30 minutes after he was first accosted by Officer Johnson, "defendant answered certain [of the officer's] questions" in the following manner:

As to time, the defendant indicated that it was 9:10 P.M. and the Trooper noted that it was 9:10 P.M. on Friday January 29. The defendant indicated that the day of the week was in fact Friday. The defendant testified [sic] that he had eaten steak, that he was employed as a [sic] Electronic Technician, that he had not been injured, that he did not take insulin for diabetes and in fact was not a diabetic, that he had taken no other type of medication. The defendant testified [sic] that when he had last slept he had slept for ten (10) hours.

Not all trial errors which violate the constitution automatically call for reversal. Harrington v. California, 395 U.S. 250, 251. Although it was incumbent upon the arresting officer

to advise defendant of his right to remain silent, the fact that anything he said might be used against him in court, his right to consult with an attorney and to have counsel present during interrogation and his right to appointed counsel if he were indigent, the admission of defendant's statements into evidence in the case at bar cannot be seen to have contributed to his conviction. In Harrington the defendant claimed error based on the statements of his codefendant which were admitted at trial and which placed Harrington at the scene of the crime. The court held that in view of the other overwhelming evidence against the defendant, the prejudicial effect of admitting the statement was rendered harmless. Our Supreme Court in People v. Burbank, 53 Ill.2d 261, 291 N.E.2d 161, has similarly held that the erroneous admission of statements placing defendant at the scene of the crime may be considered harmless where the weight of other evidence against him is overwhelming.

In the case at bar the erroneously admitted statements are not nearly so damaging as those discussed in Harrington and Burbank. Here defendant testified to many of the same facts at trial as were contained in the disputed statements. While the admission that he did not feel ill at the time of questioning may be construed as being prejudicial to his strategy of defense, it is entirely consistent with his characterization of the after-effects of his accident as being temporary in nature.

Based on the evidence in this record, we find the error of admitting these statements of the defendant to be harmless beyond a reasonable doubt and therefore leave his conviction undisturbed.

AFFIRMED.

Lorenz and Sullivan, JJ., concur.

Abstract.

9-14-73
5th Div
50 pin.



56736

PEOPLE OF THE STATE OF ILLINOIS,)	
	)	APPEAL FROM THE CIRCUIT
Respondent-Appellee,	)	COURT OF COOK COUNTY.
)	
vs.)	
)	
MELVIN ALLEN,	)	Hon. Francis T. Delaney,
	)	Presiding.
Petitioner-Appellant.)	

*PER CURIAM (FIRST DISTRICT, FIRST DIVISION):

Melvin Allen, petitioner, appeals the denial of his pro se post-conviction petition filed pursuant to the Illinois Post-Conviction Hearing Act (Ill.Rev.Stat. 1971, ch.38, par. 122-1, et seq.) without an evidentiary hearing. On appeal, petitioner contends that he was denied the right to effective assistance of counsel at the post-conviction proceedings.

Petitioner, after a bench trial, was convicted of murder and sentenced to a term of 15 to 25 years. Petitioner appealed and on April 20, 1972, this court affirmed the judgment of conviction. On November 4, 1970, during the pendency of his direct appeal, petitioner filed a pro se post-conviction petition. On July 12, 1971, a hearing was held on the State's motion to dismiss the post-conviction petition. At the hearing, the assistant public defender assigned to represent petitioner stated that he had reviewed the entire transcript of proceedings, the pro se post-conviction petition and had a questionnaire filled out by petitioner. A second assistant public defender had also read the transcript, had personally interviewed defendant in the penitentiary, and had personally interviewed petitioner's original trial counsel. Counsel reviewed each of petitioner's allegations and concluded that in his opinion none of the issues thus raised demonstrated a denial of petitioner's constitutional rights. The trial court denied petitioner's pro se post-conviction petition.

On appeal, petitioner's only argument is that he was denied the effective assistance of counsel at the post-conviction proceedings. Petitioner reasons that his counsel's action in informing the trial court that none of the contentions raised in the pro se post-conviction petition demonstrated a denial of petitioner's constitutional rights, without first informing petitioner, denied him the required opportunity to raise additional issues before the trial court, as required by Anders v. California, 386 U.S. 738, and that counsel's conduct constituted an abdication of counsel's proper role as an advocate for his client's cause.

In People v. Cleveland Dorsey, No. 43315, the Illinois Supreme Court, on May 18, 1971, issued an unpublished order affirming the circuit court of Cook County in its dismissal of a pro se post-conviction petition. There, appointed counsel filed a motion for leave to withdraw in the trial court on the grounds that the facts failed to demonstrate any deprivation of defendant's constitutional rights. The State filed a motion to dismiss. The trial court allowed both the motion to withdraw and the motion to dismiss. In affirming the judgment of the circuit court of Cook County, the Supreme Court said:

"Anders applies only to cases on appeal, and not to trial court proceedings. A post conviction petitioner is entitled to the services of counsel and counsel should not be granted leave to withdraw prior to disposition of the proceeding. In spite of the fact that an Anders motion is inappropriate in trial court proceedings, we find no prejudicial error here. Counsel stated at the hearing that he had corresponded with defendant and that defendant had filled out a questionnaire and returned it to him. Counsel also stated that he had read the transcript. He then presented the claims of defendant and stated that in his opinion these allegations did not justify post conviction relief. While an attorney should be an advocate for his client, he is not obligated to urge frivolous points which are contrary to the law and the facts."

In People v. Townsel, _____ Ill.App.3d _____, _____ N.E.2d _____, (No. 57110, decided July 31, 1973), petitioner appealed the denial of his pro se post-conviction petition. At the hearing on the State's motion to dismiss, counsel stated that he had read the report of proceedings, examined the pro se post-conviction petition, had a questionnaire filled out by the petitioner and had a personal interview with the petitioner. Counsel then reviewed each of the contentions raised by petitioner and concluded that none of the arguments showed a deprivation of petitioner's constitutional rights. On appeal, petitioner argued that under Anders v. California, 386 U.S. 738, his counsel's failure to notify petitioner in advance that he would inform the court that none of petitioner's allegations had substantial merit, denied petitioner the opportunity to contest counsel's conclusions with his own memorandum. Petitioner also argued that he had no one advocating his cause in the trial court. The court, after noting that Anders applies only to cases on appeal, stated:

"In Supreme Court Rule 651, our court has established requirements of advocacy for counsel appointed to represent a post-conviction petitioner, and there is no provision for advance notification by counsel to petitioner, should counsel decide to exercise his Dorsey right to communicate his conclusion to the trial court after having argued petitioner's contentions to the court at the hearing on the State's motion to dismiss.

* * *

"We conclude that petitioner's constitutional right to an advocate in respect of his post-conviction petition at the trial level was not violated."

In the case at bar, petitioner's appointed counsel stated that he had completely reviewed the transcript of proceedings, the pro se post-conviction petition, and had a questionnaire filled out by petitioner. A second assistant public defender had also reviewed the transcript, had personally interviewed

defendant and had interviewed petitioner's trial counsel. Counsel reviewed each of petitioner's contentions and concluded that none of them raised a constitutional question within the scope of the Post-Conviction Hearing Act. This procedure satisfied the requirements of Illinois Supreme Court Rule 651(c), (Ill.Rev.Stat. 1971, ch.110A, par.651(c),) and People v. Slaughter, 39 Ill.2d 278, 235 N.E.2d 566; and does not conflict with the guidelines set forth in the Anders case. Petitioner was not denied his right to effective assistance of counsel at the post-conviction proceedings.

For the foregoing reasons, the judgment of the circuit court of Cook County is affirmed.

JUDGMENT AFFIRMED.

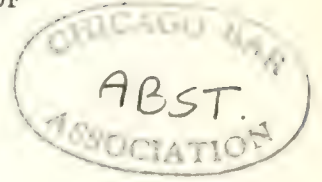
*Mr. Presiding Justice Joseph Burke did not participate.

Abstract Only.



58534)
58535) Cons.

PEOPLE OF THE STATE OF ILLINOIS,)	
	)	APPEAL FROM THE
Plaintiff-Appellee,	)	CIRCUIT COURT OF
	)	COOK COUNTY.
vs.)	
)	
ALEJO CRUZ,	)	HONORABLE
	)	PHILIP ROMITI,
Defendant-Appellant.	)	PRESIDING.



PER CURIAM:

Defendant was charged in two separate indictments with the unlawful sale of a narcotic drug on October 5, 1970, and February 11, 1971, in violation of Section 22-3 of the Criminal Code (Ill.Rev.Stat. 1969, ch. 38, par. 22-3). On September 24, 1971, the defendant withdrew his previously entered plea of not guilty and entered a plea of guilty to each indictment. He was placed on probation for a period of 60 months on each indictment, to run concurrently. On September 8, 1972, a hearing was held on a rule to show cause why the defendant's probations should not be terminated. The rule was based on the fact that on September 8, 1971, the defendant had committed the offense of burglary. After the hearing, defendant's probation was revoked in each case and he was sentenced to a term of one to four years on each charge, the sentences to run concurrently.

The defendant filed his notice of appeal from the revocations of probation and the Public Defender of Cook County was appointed to represent him. On May 17, 1973, the Public Defender filed a motion for leave to withdraw, supported by a brief pursuant to Anders v. California, 386 U.S. 738, in which he alleged that the only basis for appeal was whether the defendant was denied procedural due process of law in his probation revocation hearing. The brief concludes that an appeal on this issue "would be without merit and could not possibly be successful."

The defendant was served with copies of the motion and brief and was given time within which to file any points he might choose in support of the appeal. The defendant has filed no response.

At the hearing of September 8, 1972, on the rule to show cause why the defendant's probation should not be terminated, the evidence clearly showed that the defendant, who was represented by counsel, committed the offense of burglary. This violated a condition of his probation. Proof of violation of probation need be established only by a preponderance of the evidence. People v. Witherspoon, 9 Ill.App.3d 317, 292 N.E.2d 202. Further, a probation hearing need not be delayed until trial is had on the burglary offense alleged to have been committed by the defendant during the period of probation. People v. Frank Smith, 105 Ill.App.2d 14, 245 N.E.2d 13, petition for leave to appeal denied, 40 Ill.2d 581; People v. Riso, 129 Ill.App.2d 356, 362, 264 N.E.2d 236.

The record reveals that the defendant was afforded all of the procedural safeguards relating to a probation revocation hearing as provided by the statute and the case law. Ill.Rev. Stat. 1969, ch. 38, par. 117-3; People v. Price, 24 Ill.App.2d 364, 164 N.E.2d 528; People v. Spencer, 7 Ill.App.3d 1083, 288 N.E.2d 710. The defendant was notified of the charges against him; he appeared in court with his appointed counsel to defend against the charges; and he was given a fair judicial hearing on the issue of whether he had violated the conditions of his probation. People v. Hill, 6 Ill.App.3d 442, 286 N.E.2d 1; People v. Bacon, 124 Ill.App.2d 262, 260 N.E.2d 357.

We have examined the record and concur in the opinion of the Public Defender that the argument raised does not have substantial merit. Our inspection of the record does not disclose

58534
58535

any additional possible grounds for appeal which are also not frivolous. Accordingly, the Public Defender of Cook County is granted leave to withdraw as counsel for the defendant on appeal, and the judgment of conviction is affirmed.

PETITION ALLOWED;
JUDGMENT AFFIRMED.

FIRST DISTRICT-SECOND DIVISION
DOWNING, J., did not participate.



58699

PEOPLE OF THE STATE OF ILLINOIS,)	
	)	APPEAL FROM THE
Plaintiff-Appellee,	)	CIRCUIT COURT OF
	)	COOK COUNTY.
vs.)	
)	
GERALD WORMLEY,	)	HONORABLE
	)	DANIEL J. WHITE,
Defendant-Appellant.	)	PRESIDING.

PER CURIAM:

The defendant, Gerald Wormley, was charged with the offense of theft in that he "knowingly exerted unauthorized control over property, \$8.00 in United States currency, of the value of less than \$150.00, the property of Betty Jean Davis, with the intent to deprive said Betty Jean Davis permanently of the use and benefit of said property in violation of Section 16-1(a)(1)" of the Criminal Code (Ill.Rev.Stat. 1971, ch. 38, par. 16-1). After a bench trial the defendant was found guilty and sentenced to the House of Correction for one year.

The sole issue on appeal is whether there was such a variance between the complaint, the evidence and the sentence that the judgment of the trial court must be reversed.

On July 21, 1972, at about 3 o'clock in the morning, Mrs. Betty Jean Davis was sitting on the step of the apartment house where she lived, which is behind the apartment building located at 5506 South Wabash Avenue, Chicago. She saw "three fellows" sitting in front of the building. When she got up to go into the house, one of them grabbed her around the neck. Then the defendant went into her brassiere and took out \$8.00. Mrs. Davis had seen the defendant before because he lived in the building. The defendant denied he took any money from Mrs. Davis.

Section 16-1(a)(1) of the Criminal Code (Ill.Rev.Stat. 1971, ch. 38, par. 16-1) provides that "a person commits theft

when he knowingly *** obtains or exerts unauthorized control over property of the owner *** and intends to deprive the owner permanently of the use or benefit of the property." Section 16-1 further provides that "a person first convicted of theft of property not from the person and not exceeding \$150 in value shall be fined not to exceed \$500 or imprisoned in a penal institution other than the penitentiary not to exceed one year, or both"; and that "a person convicted of theft of property from the person or exceeding \$150 in value shall be imprisoned in the penitentiary from one to 10 years."

Citing no authority, other than Section 16-1 of the Criminal Code, the defendant argues "that where a penal statute particularizes various punishments applicable to violations of that statute, if he is charged and convicted pursuant to that statute, at least one of those punishments must fit the crime; conversely, where one of the punishments does not, in fact, fit his crime, the sentencing becomes an impossibility." It would appear that the substance of the defendant's argument is that since the evidence shows "that the theft was only from the person of the complaining witness," the crime of the defendant was subject to imprisonment "in the penitentiary from one to 10 years" under Section 16-1 of the Criminal Code; and, therefore, it was error for the court to sentence the defendant to the House of Correction for one year. Stated differently, the defendant seems to argue it was error for the trial court to sentence him for a misdemeanor when the evidence shows he was guilty of a felony.

Defendant cannot assign error on a judgment which is in his favor. People v. Goodman, 228 Ill.App. 494, 496. We affirm the judgment.

A F F I R M E D.

FIRST DISTRICT-SECOND DIVISION
HAYES, J., did not participate.

(Publish abstract only.)



57629

PEOPLE OF THE STATE OF ILLINOIS,)	
)	
Plaintiff-Appellee,	)	Appeal from the Circuit
)	
v.	)	Court of Cook County.
)	
EARNEST DIXON,)	
	)	Honorable Wayne W. Olson,
Defendant-Appellant.)	)	Presiding.

PER CURIAM:

Earnest Dixon, defendant, was charged with possession of marijuana in violation of section 704 of the Cannabis Control Act (Ill.Rev.Stat., 1971, ch. 56-1/2, par. 704). After a bench trial, he was found guilty and placed on probation for a period of one year. The only error assigned on appeal is the failure of the trial court to suppress the evidence found on defendant's person.

At the motion to suppress and at trial, the following evidence was adduced: Officer Balasko, a Chicago Police Officer, testified that on September 29, 1971, at approximately 6:40 P.M., he observed the defendant staggering in the "L" station at 63rd and Halsted, Chicago, Illinois. Defendant appeared to be intoxicated. Officer Balasko and his partner approached the defendant with the intention of aiding him and taking him home if necessary. Defendant was not placed under arrest. Defendant was escorted by Officer Balasko and his partner to their squad car. Prior to defendant entering the squad car, the officers gave defendant a pat-down search for their own protection and found three soft envelopes containing crushed green plant in defendant's pocket.

Defendant stipulated to the chain of evidence and to a laboratory report, dated September 30, 1971, in which Robert Boise, a Chicago Police chemist, reported that an analysis of the three envelopes taken from defendant's person contained 10.8 grams of Cannabis Sativa, commonly referred to as marijuana.

On appeal, defendant's only argument is that the search of his person was unreasonable in that it went beyond the scope necessary to determine if defendant had a weapon, assuming that there was a danger to the police officers and that the police were justified in stopping defendant. Officer Balasko testified that the defendant was not placed under arrest. Defendant was escorted to the police vehicle only with the intention of driving him home, since he appeared to be intoxicated. The State now argues that under these circumstances, prior to defendant being transported in a police vehicle, the police officers had the right to search him for their own protection.

In People v. Jordan, 11 Ill.App.3d 482, 297 N.E.2d 273, defendant was convicted of possession of a depressant drug. Defendant was initially stopped for a minor traffic violation and could produce only a prior driving citation. The police officers placed defendant under arrest and informed him that he would have to accompany them to the station to post the proper bond. Prior to being placed in the police vehicle, defendant was given a pat-down search for the officers' protection. The search revealed a small vial of pills in defendant's pocket, an analysis of which disclosed that the contents were a depressant drug. On appeal, the State argued that whenever circumstances require the transportation of a defendant in a police vehicle, the officer is justified in making a search. This court noted that even if this proposition were accepted, the search was still limited in scope. The officers were searching defendant only for their own protection and a small vial of pills could not possibly be a weapon. The court held that the search was unreasonable and went beyond the scope necessary for the officers' protection. See also Tinney v. Wilson, 408 F.2d 912 (9th circuit).

In the case at bar, the defendant was not placed under arrest prior to the search of his person. Even if we were to assume that the officers had the right to search defendant at all, the officers authority would have been limited to a search for weapons. Three soft envelopes which were in defendant's pocket could not possibly be weapons or potential weapons. While we make no determination as to whether the police had the right to search defendant in the case at bar, we conclude that even if they did, the search was unreasonable and went beyond the scope necessary to protect the police officers. The motion to suppress should have been sustained. The judgment of the Circuit Court of Cook County is reversed.

Judgment reversed.

Third Division: Justice Schwartz did not participate.

PEOPLE OF THE STATE OF ILLINOIS,)
)
 Petitioner-Appellee,)
)
 v.)
)
 IN THE INTEREST OF ALVIN DANIELS,)
)
 Respondent-Appellant.)

Appeal from the Circuit
 Court of Cook County,

Honorable John Navin,
 Presiding.



PER CURIAM:

Alvin Daniels, defendant, appeals from a judgment finding him in violation of a stay of mittimus for committing the offense of armed robbery. On appeal, defendant's only argument is that he was improperly denied representation by counsel of his own choice.

Defendant was originally charged by petition with being delinquent for committing the offense of robbery on September 12, 1970. On February 16, 1971, defendant was found to be delinquent and was placed on probation. On March 23, 1972, defendant was found to be in violation of his probation and he was committed to the Department of Corrections. However, the trial court entered a stay of mittimus. On July 3, 1972, a supplemental petition charging defendant with being delinquent for committing the offense of armed robbery on July 1, 1972, was filed and the public defender was appointed to represent defendant.

On August 24, 1972, a hearing was held on the alleged violation of the stay of mittimus by defendant in that he had committed the offense charged in the supplemental petition. At the start of the hearing, the assistant public defender assigned to represent defendant stated that he wished to have private counsel. The assistant State's attorney objected, stating that defendant was released from custody on July 13, 1972, arguing that defendant had adequate time to get counsel between that date and the date of the hearing. The assistant State's attorney also stated that on the last court date, defendant had demanded trial. The trial court denied defendant's request for a continuance.

Thereafter, Audrey Waszak testified that on July 1, 1972, she was riding her bike along the lakefront. She was approached by the defendant, who ran next to her bike, pulled the bike to a stop and produced a lead pipe. The defendant demanded money and threatened to kill her. Her watch was taken. She called for help upon seeing someone else on the bike path and the police were able to apprehend defendant at the scene.

Daisy Davis testified that on July 1, 1972, she saw the defendant in the park along the lakefront. Defendant left her and a short time later she observed him being taken into custody by the police.

Alvin Daniels, defendant, testified that on July 1, 1972, he went to the lakefront. He went over and talked to Mrs. Davis for a short time. After that, he walked over by the lake and was sitting on a rock. He then observed two boys stop the complainant. He did not talk to the complainant at any time and told the boys not to mess with her.

Rocco Kainess, a Chicago Police officer, testified that on July 1, 1972, he observed the complainant proceeding south on the bicycle path along the lakefront. He then observed the complainant and defendant stand together for approximately three minutes, after which the complainant drove off on her bicycle. He then proceeded to the complainant and she stated that she had just been robbed. He then apprehended the defendant. He observed the defendant, Alvin Daniels, drop a small piece of pipe prior to being arrested. A search of the defendant revealed the complainant's watch in his pocket.

Defendant's only argument on appeal is that he was improperly denied the right to representation by counsel of his own choice when, on August 24, 1972, the trial judge denied his request for a continuance to obtain privately retained counsel. Motions for continuance are addressed to the discretion of the trial court. People v. Clark, 9 Ill.2d 46, 137 N.E.2d 54. A reviewing court will not

interfere with the trial court's denial of defendant's motion for continuance unless the trial court has abused its discretion.

People v. Summers, ___ Ill.App.3d ___, ___ N.E.2d ___ (No. 55689, decided June 14, 1973).

After a complete review of the record in the case at bar, we do not believe that the trial court abused its discretion in denying defendant's motion for a continuance. Defendant had initially been found delinquent and placed on probation. Thereafter, he was found to be in violation of his probation and was committed to the Department of Corrections. The trial court stayed the mittimus in an attempt to aid in the defendant's rehabilitation. Subsequently, the defendant was charged with violation of that stay of mittimus in that he had committed an armed robbery. Defendant was held in custody from July 3 to July 13, at which time he was released. On July 13, defendant demanded trial. On August 24, 1972, defendant for the first time requested a continuance to obtain private counsel. The assistant public defender had over one and one-half months to prepare the case for trial and counsel's conduct at trial demonstrates that she was prepared and adequately represented defendant. Under all of the facts and circumstances of this case, the trial court did not abuse its discretion in denying defendant's request for a continuance to obtain private counsel.

For the foregoing reasons, the judgment of the circuit court of Cook County is affirmed.

JUDGMENT AFFIRMED.

Third Division: Justice Schwartz did not participate.

PEOPLE OF THE STATE OF ILLINOIS,)	APPEAL FROM THE
Plaintiff-Appellee,)	CIRCUIT COURT OF
vs.)	COOK COUNTY
ALFREDO GONZALES,)	
Defendant-Appellant.)	HONORABLE
	JOSEPH A. POWER,
	PRESIDING.

★

PER CURIAM (FIFTH DIVISION, FIRST DISTRICT):

Petitioner, Alfredo Gonzales, appeals from an order sustaining the motion of the People to dismiss his petition for relief under the Post-Conviction Hearing Act (Ill. Rev. Stat. 1971, ch. 38, par. 122-1, et seq.) without an evidentiary hearing. On this appeal, he contends his appointed counsel was inadequate in that he should have amended the pro se petition to set forth the factual basis upon which the conclusions in that petition were based.

Petitioner's post-conviction petition sets forth 13 allegations to wit:

1. He was placed under an unlawful arrest, as he was arrested without any arrest warrant, also without just reason,
2. He was not advised of his right that he could remain quiet upon arrest,
3. He was not allowed to call his family or attorney when arrested & which right is secured to the defendant by Section 103-3 Chapter 38, Illinois Revised Statutes, and such right of a person in custody to communicate with an attorney is granted in the due process clause of the 14th Amendment to the United States Constitution as well as Article 2, Section 2, of the Illinois Constitution,
4. He charges that he was attacked several times by police officers during his first (3) three days of custody because he would not answer all questions put to him, and mainly because he would not sign a statement without a lawyer present,
5. He charges that he was arrested the 19th day of April 1966, but was not appointed an attorney until the 2nd of June 1966,
6. He was denied and deprived of his right to a trial by jury by trickeration of his court appointed counsel,

* MR. JUSTICE ENGLISH did not participate.

7. He was forced into entering a plea of guilty through fear and threat by the prosecuting attorney and court appointed counsel who acted jointly with the prosecuting attorney to secure a conviction against petitioner notwithstanding the fact of guilt or innocence of the defendant,
8. He was not afforded proper representation as said court appointed counsel did not have petitioner's interest at heart,
9. He was not afforded even the basic amount of fairness as his entire case was a one sided affair run by the prosecutor and agreed to by said court appointed counsel who outwardly not only made it known that he was prejudiced, but also that he was in a hurry to get the thing over and done with,
10. His rights to "due process" and "equal protection of the law" were over-looked by presiding judge in this matter,
11. He was denied of a fair, just, and impartial trial in a court-room free of prejudice and trickery,
12. His rights were discriminated against, as while others received and enjoyed their constitutional rights, he the petitioner was denied many of his,
13. He also charges that he has filed several petitions for his transcript and common-law records since his conviction, he thought he was lawfully entitled to these by the Constitution, but has been denied on each try.

The State filed a motion to dismiss on the ground that the allegations failed to raise any constitutional question and were bare allegations not sufficient to require a hearing. Appended to the motion was a copy of the proceedings on June 21, 1966, when defendant entered pleas of guilty to four separate indictments: 66-1669, an armed robbery with a gun at Bud's Shell Station, 2001 West Belmont, in Chicago; 66-1670; a robbery of a service station at 3055 North Ashland in Chicago, 66-1671; a grocery store robbery in Chicago; and finally, 66-1672, also a robbery charge.

The assistant public defender appointed by the court filed a certificate pursuant to Supreme Court Rule 651(c) stating that he had consulted with the petitioner by mail on several occasions and visited him at the Illinois State Penitentiary at Menard on January 7, 1972, examined the records of the proceedings at trial, "thoroughly studied petitioner's pro se petition, which fully and adequately presents all possible claims subject to relief under the Illinois Post-Conviction Hearing Act", and felt it "unnecessary to amend or change it in any

manner." At the hearing on the petition on March 23, 1972, he advised the court orally in the same terms as stated in his certificate and added that based on his consultations with the petitioner, he "felt there was nothing further to amend the petition." The post-conviction petition was dismissed without an evidentiary hearing.

OPINION

Petitioner contends that his appointed counsel's representation was inadequate in that he should have amended the pro se petition to set forth the factual basis upon which the conclusion in the petition were based. Petitioner relies primarily on People v. Hawkins, 44 Ill.2d 296, 255 N.E.2d 456. In Hawkins, the Supreme Court reversed and remanded dismissal of a post-conviction petition because counsel represented petitioner inadequately in failing to revise petitioner's pro se post-conviction petition which was "to a great extent, conclusional in nature and unsupported by factual documentation" and which contained certain statutory deficiencies in form. It appeared to the court that the petitioner in that case had a very meager knowledge of the law. Also see People v. Slaughter, 39 Ill.2d 278, 235 N.E.2d 566.

In the instant case, the allegations in the petition involve rather all-encompassing allegations of constitutional violations but are totally conclusional in nature. In post-conviction proceedings, a petitioner's assertions and conclusions absent significant factual allegations indicating the "respects" in which his constitutional rights have been violated do not justify the holding of an evidentiary hearing. As the Hawkins case points out, the duty of counsel in such situations is to consult with his client regarding the facts of his allegations and to put any pro se petition which may have been filed into proper legal form alleging facts and not conclusions. Counsel in the instant case did not fulfill this duty. Clearly, petitioner's allegation that he was denied a trial through the trickery of his court appointed counsel could have, at a minimum, been amended to set out what petitioner claimed was said by counsel, when it was said, where it was said and

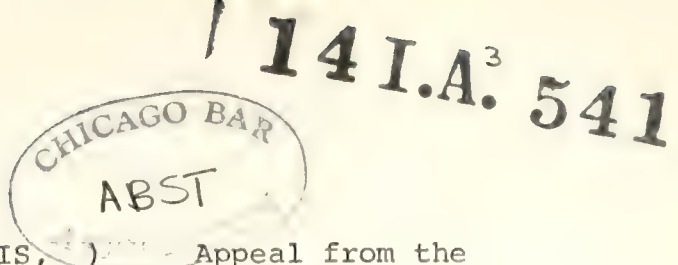
who was present. Likewise, petitioner's allegation that he was forced into pleading guilty due to the fear caused by the threats of the prosecutor could have been amended to state specifically petitioner's claims as to what threats were made, when they were made, to whom they were made, where they were made and who was present. The case cited by the State on this matter, People v. Wollenberg, 9 Ill.App.3d 1028, 293 N.E.2d 728, is distinguishable from both Hawkins and the instant case since briefs making sufficient arguments regarding the matters in the petition were filed and considered, which is not the situation here.

For the above reasons, the matter must be reversed and the cause remanded with directions to appoint new counsel to consult with petitioner and for further proceedings not inconsistent with this opinion.

Reversed and remanded with directions.

ABSTRACT ONLY





PEOPLE OF THE STATE OF ILLINOIS,	)	Appeal from the
Plaintiff-Appellee,	)	Circuit Court of
	)	Cook County
vs.)	
	)	Honorable
ANDREW WEATHERS,	)	Francis T. Delaney,
Defendant-Appellant.	)	Presiding.

PER CURIAM* (FIFTH DIVISION, FIRST DISTRICT):

Defendant pleaded guilty on August 18, 1970, to two counts of aggravated battery and was placed on probation for five years. Ill. Rev. Stat. 1969, ch. 38, par. 12-4(a), 12-4(b)(1).¹ After a hearing on a rule to show cause why defendant's probation should not be terminated (following his conviction on March 23, 1972, of murder and the imposition of a 40 to 80 year sentence in that case), defendant's probation was revoked and he was sentenced to a term of not less than three nor more than eight years in the Illinois State Penitentiary, the sentence to run consecutive to that imposed on the murder conviction.

Defendant appeals, contending that (1) the trial judge improperly based the sentence upon the circumstances of the alleged murder indictment; (2) the maximum violated the five year maximum applicable to Ill. Rev. Stat. 1972 supp., ch. 38, par. 12-4(b)(1); (3) the three year minimum is excessive because it exceeds one third the applicable maximum.

Evidence

Garnell Taylor, for the State:

He is the complainant. His right forearm and wrist (which he exhibited to the judge) had some shotgun pellets in them as the result of the acts of the defendant alleged in the complaint. He thought probation and letting the defendant

*MR. JUSTICE ENGLISH did not participate.

1. §12-4. Aggravated Battery

(a) A person who, in committing a battery, intentionally or knowingly causes great bodily harm, or permanent disability or disfigurement commits aggravated battery and shall be imprisoned in a penal institution other than the penitentiary not to exceed one year or in the penitentiary from one to 10 years.

(b) A person who, in committing a battery either:
 (1) Uses a deadly weapon; ***

out of jail would be the best disposition of the case. He had not been threatened.

At the change of plea proceedings on August 18, 1970, the assistant public defender then indicated that defendant wished to waive his right to trial by jury and plead guilty on the understanding that he would receive five years probation and credit for the nearly four months he had already spent in the County Jail. The judge advised the defendant as follows:

"THE COURT: Before I accept your plea it is my duty to advise you that under your plea of guilty to this indictment charging you with two counts of aggravated battery, I may sentence you to the Illinois State Penitentiary for any term of years, not less than one not more than ten.

Understand that, sir?

THE DEFENDANT: Yes, sir.

* * * * *

THE COURT: Let the record show that Andrew Weathers, having been advised of the consequences of his plea to this indictment, and being so advised he still persists in his plea.

The plea, therefore, will be accepted and finding of guilty of aggravated battery, causing bodily harm to the victim, and aggravated battery by use of a deadly weapon, and judgment on both findings."

The assistant public defender also stated that he had advised the defendant that if he got "in any kind of trouble, violate your probation, you can be sentenced 1 to 10 years in the penitentiary" and the defendant had indicated he understood. The judge then admonished the defendant that if he came back he would go to the State Penitentiary for "9 to 10".

On April 17, 1972, at the hearing on the rule to show cause why the defendant's probation should not be revoked, the assistant State's attorney indicated the reason for the violation of probation was the March 23, 1972 conviction of the defendant for the crime of murder in indictment 71-2014 and summarized the facts in this indictment as follows:

"And on May 1, 1971 at 2:05 A.M. defendant, while in the company of one Tyrone Hughes, and armed with a sawed-off shotgun robbed one P. L. Johnson ... Willie Johnson ... and ... Ernest Douglas. During the commission of this offense defendants also attempted to rob one Herman Milton and at this time shot and killed Milton."

A certified copy of the murder conviction was introduced into

evidence.

The State recommended a sentence of not less than five nor more than ten years on the original charge to run consecutively to the sentence received under the murder indictment, stating that defendant had used a sawed-off shotgun in both instances and that in the first case the victim (Garnell Taylor) put up his hands, defendant shot him once with the shotgun, aimed again, the gun clicked but did not go off.

OPINION

Defendant contends that the trial judge improperly based the sentence upon defendant's subsequent conviction for murder. His argument is based on a literal reading of certain parts of the court's opinion in People v. Livingston, 117 Ill.App.2d 189, 254 N.E.2d 64, where the defendant, 18 years of age, pleaded guilty to a burglary charge involving \$2.30 worth of oil and where the acts of delinquency which led to revocation of probation were misdemeanors viz: criminal damage to property when defendant threw a pot through his girl friend's window and riding as a passenger in a car which had been taken without the owner's consent. The trial judge there imposed a sentence of five to ten years in the penitentiary which sentence this court reduced to two to five years under Supreme Court Rule 615. Livingston, however, has been distinguished in People v. Ford, 4 Ill.App.3d 291, 280 N.E.2d 728, which is controlling in the case at bar. The defendant here was specifically admonished in open court before the court accepted his plea of guilty that the court might impose a sentence of up to ten years, and that the sentences might run consecutively. The second offense was clearly relevant to the sentence to be imposed on the original charge in that both offenses involved the use of a sawed-off shotgun. It is not realistic to expect that the nature of the subsequent offense for which the probation is revoked will be completely ignored in determining the "rehabilitation possibilities" of the defendant.

The record also shows that at the first trial defendant pleaded guilty to both aggravated battery counts, that is, first, to the violation of 12-4(a), committing a battery which caused great bodily

harm or permanent disability or disfigurement and, second, to the count charging a violation of paragraph 12-4(b) (1), using a deadly weapon in committing a battery. Since a violation of 12-4(a) is the more serious offense, it is clear that the trial court imposed the single sentence for the more serious offense, i.e., 12-4(a). (People v. Lerch, 52 Ill.2d 78, 284 N.E.2d 293.) We find no merit in defendant's contention that the trial judge improperly based the sentence after the violation of probation on defendant's conviction of murder and find no reason to have defendant's sentence made concurrent with the sentence on his murder conviction.

Finally, defendant maintains that the sentence imposed is excessive under the provisions of the Unified Code of Corrections, which became effective January 1, 1973. (Ill. Rev. Stat. 1972, supp., ch. 38, par. 1008-6-1.) As revised, paragraph 12-4(d) of the Criminal Code provides that aggravated battery is a Class 3 felony. (Ill. Rev. Stat. 1972 supp., ch. 38, par. 12-4(d).)¹ Under the Unified Code of Corrections, Class 3 felonies have a maximum term of "any term in excess of one year not exceeding ten years." (Ill. Rev. Stat. 1972 supp., ch. 38, par. 1005-8-1(b) (4).)² The suggested minimum is one year unless the court sets a higher minimum which "shall" not be greater than one third the maximum. Ill. Rev. Stat. 1972 supp., ch. 38, par. 1005-8-1(c) (4).³

Since the maximum sentence is eight years, the proper minimum sentence here is not three years but two years and eight months which

1. §12-4. Aggravated Battery.)

(d) Sentence.

Aggravated battery is a Class 3 felony.

2. §1005-8-1. Sentence of Imprisonment for Felony.)

(b) The maximum term shall be set according to the following limitations:

(4) for a Class 3 felony, the maximum term shall be any term in excess of one year not exceeding 10 years;

3. §1005-8-1. Sentence of Imprisonment for Felony.)

(c) The minimum term shall be set according to the following limitations:

(4) for a Class 3 felony, the minimum term shall be 1 year unless the court, having regard to the nature and circumstances of the offense and the history and character of the defendant sets a higher minimum term, which shall not be greater than one-third of the maximum term set in that case by the court;

conforms the sentence to the requirements of paragraph 1005-8-1(c) (4) that the minimum sentence in a Class 3 felony "shall" not exceed one third the maximum term set by the court. Accordingly, the judgment is affirmed, the sentence is vacated and the cause remanded to the circuit court of Cook County for proper re-sentencing. People v. Harvey, 53 Ill.2d 585, 294 N.E.2d 269.

Affirmed in part and
remanded with directions.



14 I.A.³ 553

72-285.

UNITED STATES OF AMERICA

State of Illinois)
Appellate Court) ss.
Second District)

ABST.

At a session of the Appellate Court, begun and held at Elgin, on the 4th day of December, in the year of our Lord one thousand nine hundred and seventy-two, within and for the Second District of Illinois:

Present -- Honorable WILLIAM L. GUILD, Presiding Justice

Honorable THOMAS J. MORAN, Justice

Honorable GLENN K. SEIDENFELD, Justice

LOREN J. STROTZ, Clerk Pro Tem

JOSEPH C. DORING, Sheriff

BE IT REMEMBERED, that afterwards, to wit: On

October 10, 1973 the Opinion of the Court was filed in the Clerk's office of said Court, in the words and figures following, viz:



IN THE
APPELLATE COURT OF ILLINOIS
SECOND DISTRICT

FILED

OCT 10 1970

LOREN J. STRLIZ, Clerk pro tem
Appellate Court, 2nd District

PEOPLE OF THE STATE OF ILLINOIS,)	
)	
Plaintiff-Appellee,	)	Appeal from the Circuit
	)	Court of the 17th Judi-
v.	)	cial Circuit, Winnebago
	)	County, Illinois.
VAN BUREN LASTER, JR.,)	
)	
Defendant-Appellant.)	

MR. JUSTICE SEIDENFELD delivered the opinion of the court:

Defendant, Van Buren Laster, Jr., appeals from an order denying his post-conviction petition after an evidentiary hearing.

Defendant had previously pleaded guilty to an indictment charging him with armed robbery and was sentenced to 5-15 years in the penitentiary. No direct appeal was taken from the conviction and sentence. Defendant thereafter filed a pro se petition under the post-conviction hearing act (Ill. Rev. Stat. 1971, ch. 38, par. 122, et seq.), which was subsequently amended with the aid of appointed counsel.

On appeal defendant argues that his plea should not have been accepted because the court did not establish that he understood the nature of the charge against him and the consequences of a guilty plea, and that he was improperly induced to plead guilty by the representations of the Assistant Public Defender.

The plea, taken on March 10, 1970, is governed by Supreme

Court Rule 401(b) then in effect (Ill. Rev. Stat. 1969, ch. 110A, par. 401(b)) which required that the court find *** "from proceedings had in open court at the time *** plea of guilty entered, *** that he understands the nature of the charge against him, and the consequences thereof if found guilty *** ". Also applicable are Ill. Rev. Stat. 1969, ch. 38, secs. 113-4(c), and 115-2, requiring that the court inform the defendant of the consequences of his plea and the maximum penalty which may be imposed.

The principal argument of defendant is that the record shows that no effort was made by the court to determine whether the defendant understood the nature of the charge and all of the consequences of pleading guilty. Decision of this issue may not rest solely on implications arising from the common law record. (People v. Washington (1955), 5 Ill. 2d 58, 63.) However, a reviewing court may consider the entire record in deciding whether there was sufficient compliance with governing Rule 401(b). People v. Bowers (1972), 4 Ill. App. 3d 453.

It is true that the judge did not himself inquire as to the nature of the charge at the time he accepted the change of plea. However, with that exception, the court fully admonished defendant and advised him as to the consequences of his plea.

It is also significant that the court inquired of the State's Attorney in open court in the presence of the defendant at the outset of the proceedings:

"THE COURT: What is your motion today?

"MR. GEMINGNANI: These five defendants previously entered a plea of not guilty to the charge of armed robbery occurring on January 1, 1970, when with a gun they took money from Samuel Osborne of the Payless Grocery Store in Rockford.

"I understand each of the defendants wish to withdraw a plea of not guilty and move the Court to accept a plea of guilty to said charge.

"MR. VELLA: That is correct. I would ask leave of Court to change the plea to guilty."

Further, although the transcript of the arraignment was not included in this appeal, the common law record of the arraignment, when the not guilty plea was initially entered, contained a docket entry that the nature of the charge was duly explained to the defendant. Despite its conclusory form, and its diminished effect here because of the time elapsed between arraignment (February 2, 1970) and the change of plea (March 10, 1970)(see People v. Juerke (1972), 6 Ill. App. 3d 559, 562), we agree with the position of the State that, absent a transcript of the original proceedings, we may include the common law docket entry in our consideration of the entire record on this issue. People v. Bowers (1972), 4 Ill. App. 3d 453, 456.

Neither the explanation of the State's Attorney at the time of the change of plea, nor the docket entry standing alone, relate to the actual understanding and comprehension by the defendant of the nature of the charge against him. Thus, even though defendant does not claim that he did not understand the nature of the charge, we must determine whether the record discloses that the admonishment contained the essential information and whether the record supports the court's belief that defendant understood the nature of the charge against him. People v. Mims (1969), 42 Ill. 2d 441, 248 N.E. 2d 92, 94.

Thus, while the court did not question the defendant particularly as to his understanding of the nature of the charge, we are of the opinion that, in light of the entire record, the admonishment to the defendant was sufficient. Further, the court's conclusion that the defendant did in fact understand the nature of the charge is supported by the entire record of the court's inquiries and the defendant's unequivocal responses. See People v. McCrady (1971), 131 Ill. App. 836, 839; People v. Palmer (1971), 1 Ill. App. 3rd, 492, 493-4.

Defendant also contends that the court's admonishment as to the maximum sentence was "ambiguous". We disagree. The court stated:

"On your plea of guilty the Court might sentence you to the penitentiary for a period of years not less than two or a maximum number of years to be fixed by the Court, or any combination of years not less than the minimum or more than the maximum."

The court's statement sufficiently advised defendant of the maximum penalty he could receive on a plea of guilty. See People v. Scott (1969), 43 Ill. 2d 135, 142.

Defendant's further argument that he was improperly induced to plead guilty by the representations of the Assistant Public Defender is not supported by the record. The post-conviction petition, as amended, contained the allegation that defendant was induced to plead to the armed robbery charge by representations of the Assistant Public Defender that he would not further represent defendant unless he pleaded guilty; and the Defender's alleged statement that defendant would receive probation or his sentence would not be more than 2-5 years. The court heard the testimony of the defendant, a co-defendant and defendant's mother tending to corroborate the allegations and also heard the testimony of the Assistant Public Defender in denial. The trial court's resolution of this issue on conflicting evidence was not manifestly erroneous and will be upheld. People v. Downen (1970), 45 Ill. 2d 197, 201; People v. Caise (1967), 38 Ill. 2d 486, 489.

We affirm the judgment below.

Judgment Affirmed.

GUILD, J., and THOMAS J. MORAN, J., concur.



57962)
57963)

PEOPLE OF THE STATE OF ILLINOIS,)	
	)	APPEAL FROM THE
Plaintiff-Appellee,	)	CIRCUIT COURT
	)	OF COOK COUNTY.
v.)	
	)	HONORABLE
RAYMOND SIMMS and CARLTON HENDERSON,	)	THOMAS CAWLEY,
	)	PRESIDING.
Defendants-Appellants.)	

MR. JUSTICE EGAN delivered the opinion of the court:

The defendants were charged with attempt to commit burglary, and on the day set for hearing the State nolle prossed that charge and filed a misdemeanor complaint of criminal damage to property. After a bench trial, both defendants were found guilty; Henderson was sentenced to the County Jail for one year, and Simms for 90 days.

On May 11, 1972, Officer William Duffy and his partner, in response to a radio call, went to a National Tea Food Store at 2344 West Chicago Avenue at 1:00 a.m. He noticed a man on the roof, and after climbing a rain gutter he saw three men who started running. Two of them were the defendants. All three men were placed under arrest. Duffy testified that while on the roof he asked Henderson, out of the presence of Simms, if he was trying to get into the building and Henderson said that "he was trying to get in." Henderson denied telling the officers anything.

On the roof the screen over the air conditioner vent had been bent over so that it was almost completely off. The damage to the screen was estimated at \$15. The attorney for the defendants asked Duffy whether the screen was bent from the wind and Duffy said that it was not.

Both defendants testified that they were with Jerome Marshall; that Henderson threw a bag of marijuana up on the roof, which is approximately 12 feet from the ground,

because police cars were coming down Chicago Avenue; and that all three went up on the roof to recover the marijuana.

Duffy, in rebuttal, testified he searched the roof and saw no marijuana.

Henderson contends that his statement should have been suppressed under Miranda v. Arizona, 384 U.S. 436, because, even if the required warnings were given, the record does not show that the defendant made an intelligent, voluntary waiver of his rights. Only the officer testified on the motion to suppress. It is clear that the warnings testified to by Officer Duffy complied with the requirements of Miranda. He testified that some shots had been fired and the defendant was nervous. But he also said that he asked Henderson if he understood what Duffy had told him and Henderson "said yes." On the record before us, we cannot say that the trial court's determination that Henderson's waiver was voluntary was incorrect.

Simms contends that the court erred in considering the statement of Henderson against him. First, it is presumed that the court considered only competent evidence, and there is nothing in the record to indicate that the judge did consider the evidence against Simms. Second, there is nothing in Henderson's statement that would incriminate Simms. Third, there was no objection to the testimony by Simms.

Both defendants argue that the proof fails to establish their guilt beyond a reasonable doubt. We believe that it does. The factfinder could reasonably infer that the damage to the screen was done in an attempt to enter the building and that those present on the roof at one o'clock in the morning, who attempted to flee, were the ones who had attempted to enter the building. In a case similar on its facts, the



Supreme Court, in passing on a defendant's explanation of how he happened to be on a roof when arrested, said that the explanation was "unbelievably strange and incredible." (People v. Bravieri, 21 Ill.2d 369, 372, 172 N.E.2d 788.) We adopt that same evaluation here for the testimony of the defendants.

Last, the defendants argue their sentences were excessive. Both defendants were 20 years old; Henderson had been sentenced before for two misdemeanor convictions and at the time of the offense was on probation for robbery. We do not believe that the sentences of one year and 90 days, after trial on a reduced charge, where the evidence clearly established guilt of the felony originally charged, may be deemed excessive. The judgment of the circuit court is affirmed.

JUDGMENT AFFIRMED.

BURKE, P.J. and HALLETT, J. concur.

ABSTRACT ONLY.



56737

PEOPLE OF THE STATE OF ILLINOIS,)	
)	
Respondent-Appellee,	)	APPEAL FROM THE CIRCUIT
	)	COURT OF COOK COUNTY.
v.)	
)	
ROBERT L. HUDSON,	)	HONORABLE JAMES J. MEJDA,
	)	Presiding.
Petitioner-Appellant.)	

PER CURIAM * (First Division, First District):

Robert L. Hudson, hereinafter called petitioner, appealed from the dismissal of his post-conviction petition filed pursuant to the Illinois Post-Conviction Hearing Act (Ill.Rev.Stat. 1969, ch. 38, par. 122-1 et seq.).

The sole issue on appeal is whether the trial court properly dismissed the post-conviction petition without an evidentiary hearing.

On January 12, 1968, the petitioner was convicted of robbery and murder by a jury, and was sentenced to death. On direct appeal to the Illinois Supreme Court the sentence of death was vacated and the case remanded for sentencing. (People v. Hudson, 46 Ill.2d 177, 263 N.E.2d 473.) He was subsequently resentenced to a term of not less than 100 years nor more than 199 years. The petitioner filed a post-conviction petition which contained fifteen alleged constitutional issues. The only two allegations in issue on appeal are numbers 3 and 4 which read as follows:

"3. The police denied your petitioner's request to make a phone call.

"4. The police denied your petitioner's request for an attorney."

The petitioner alleged that on May 22, 1967, at approximately 11:45 a.m. he was arrested while walking down the street at 116th and Laflin Avenue, Chicago and was taken to a coin and

* Mr. Presiding Justice Burke did not participate

gun shop at 12657 S. Western Avenue, Blue Island, Illinois where he was identified as one of three men in an attempted robbery-murder; that he was taken to a police station in Blue Island and put in a cell; that a short time later he was taken to a room where police began interrogation of him without any warning as to his right to remain silent; that he requested to talk to an attorney, which was denied; that at approximately 1:00 p.m. he was transferred to a police station in the City of Chicago where more interrogation was made without any warning of the right of the petitioner to remain silent; that he made another request for an attorney, and to make a phone call, which was denied, the police stating that he could make such a call after he told them what they wanted to hear; and that this interrogation continued without any warning as to the right to remain silent or right to have an attorney present until approximately 6:30 p.m. when the petitioner gave an oral statement implicating Carl McFadden and Harold Riggins.

The petitioner further alleged that Carl McFadden and Harold Riggins were arrested later that night or early the next morning and both were indicted along with the petitioner.

The petitioner contends that he should have been granted a post-conviction hearing on the basis of his allegations that before and during custodial interrogation the police denied his request to have counsel and to make a telephone call without informing him of his right to remain silent.

The petitioner argues that if he had not been compelled to give the oral statement after he requested an attorney he would not have implicated Carl McFadden in the case and, therefore, the police would not have known about McFadden, would not have arrested him, and McFadden would not have testified for the State against the petitioner. He argues that, therefore,

the post-conviction petition stated proper grounds for a hearing because it alleged a violation of his privilege against self-incrimination under Miranda v. Arizona, 384 U.S. 436, 86 S.Ct. 1602, 16 L.Ed.2d 694.

A proceeding under the Post-Conviction Hearing Act is a new proceeding for the purpose of inquiring into the constitutional phases of the original conviction which have not already been adjudicated. (People v. Beckham, 46 Ill.2d 569, 264 N.E.2d 149; People v. Derengowski, 44 Ill.2d 476, 256 N.E.2d 455.) Where an allegation has previously been considered and rejected by the court, any reconsideration of the same allegation in a post-conviction proceeding is barred by the doctrine of res-judicata. (People v. Weaver, 45 Ill.2d 136, 256 N.E.2d 816; People v. Walker, 6 Ill.App.3d 909, 286 N.E.2d 812; People v. Westbrook, 5 Ill.App.3d 970, 284 N.E.2d 695.) The concept of res judicata also includes all claims which were known from the original trial record and could have been raised on direct review, but were not, those being considered waived. People v. Adams, 52 Ill.2d 224, 287 N.E.2d 695; People v. Jones, 5 Ill.App.3d 951, 284 N.E.2d 418; People v. Lyons, 8 Ill.App.3d 825, 291 N.E.2d 353.

The subject matter of a post-conviction petition results from the original trial record. The petitioner may not raise alleged errors in his post-conviction petition if he could have raised them and failed to do so on his direct appeal. The petitioner stated that he could have and should have raised the point he now argues at the time of the original trial or on direct appeal. He states:

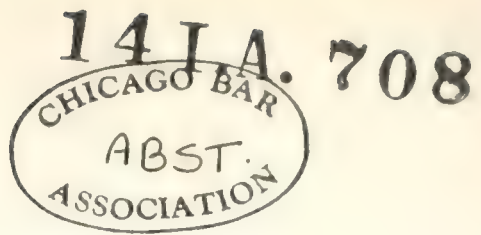
"Defendant did not move to suppress McFadden's testimony at his trial. However, defendant submits that he should have opportunity to prove his charges despite this failure. At worst, defendant's raising of the point at this late

date constitutes afterthought, but not bad faith. And where as here such afterthought relates to error which was definitely 'harmful', not merely 'harmless', the courts should be willing to afford defendant his day in court, notwithstanding its belatedness."

By this statement the petitioner admits he could have, but did not, raise the question of the violation of his privilege against self-incrimination in the trial court and also on direct appeal. Petitioner's failure to raise the issue on his direct appeal does not allow him to raise them in the post-conviction proceedings and, therefore, the trial court properly dismissed the petition without an evidentiary hearing. People v. Blewett, 11 Ill.App.3d 1051, 298 N.E.2d 366; People v. Durley, 53 Ill.2d 156, 290 N.E.2d 244.

The judgment of the circuit court of Cook County is affirmed.

JUDGMENT AFFIRMED.



56887

PEOPLE OF THE STATE OF	)	APPEAL FROM
ILLINOIS,)	
Plaintiff-Appellee,	)	CIRCUIT COURT,
)	
vs.	)	COOK COUNTY.
)	
JOHN DARRELL MANSFIELD,	)	HON. FRANCIS T. DELANEY,
Defendant-Appellant.)	)	Presiding.

*PER CURIAM (First Division, First District):

On August 17, 1970, petitioner, John Darrell Mansfield, pled guilty in the Circuit Court of Cook County to charges of rape, indecent liberties and two counts of jumping bail and was sentenced to the Illinois State Penitentiary for not less than six and not more than twelve years on the rape charge (with which the indecent liberties charge merged) and to not less than four years and not more than four years and one day on each of the bail jumping charges, all the sentences to run concurrently. On February 18, 1971, petitioner filed a pro se post-conviction petition (Ill. Rev. Stat., 1969, ch.38, par. 122-1 et seq.). The public defender filed his appearance for petitioner, who subsequently filed a motion for the appointment of counsel other than the public defender or the Illinois Defender Project. This motion was denied and the post-conviction petition was dismissed on the State's motion. Petitioner, represented on appeal by the Illinois Defender Project, has appealed contending that he was inadequately represented by the public defender at the post-conviction proceedings.

Supreme Court Rule 651(c) (Ill.Rev.Stat., 1969, ch. 110A, par. 651(c)) implementing People v. Slaughter, 39 Ill.2d 278, 235 N.E.2d 566, sets forth the standards to be followed by an attorney in a post-conviction proceeding. That rule provides:

...The record filed in that court shall contain a showing, which may be made by the certificate of petitioner's attorney, that the attorney has consulted with petitioner either by mail or in person to ascertain his contentions of deprivation of constitutional right, has examined the record of the proceedings at the trial, and has made any amendments to the petition filed pro se that are necessary for an adequate presentation of petitioner's contentions.

In the case at bar the record discloses that at the hearing on the motion to dismiss the assistant public defender stated that he had examined the transcript of the proceedings and the pro se post-conviction petition and that, while he had not personally contacted petitioner, another attorney of the public defender's office had and that he had talked to that attorney and had that attorney's notes. He further stated that he did not think it necessary to amend the post-conviction petition.

Petitioner contends that because the assistant public defender did not consult with him personally he was not adequately represented. This claim is without merit. People v. Moore, 9 Ill.App.3d 896, 293 N.E.2d 367 (Abst.). Nor has petitioner shown that any prejudice to him resulted from the fact that his interview was with an attorney of the public defender's staff other than the attorney who represented him in court.

People v. Brown, 52 Ill.2d 227, 287 N.E.2d 663, relied on by petitioner, is not in point. There the court reversed the dismissal of a post-conviction petition because the record did not show that defendant's counsel had examined the record of the trial proceedings. Here the record shows that he did.

Petitioner also claims that the failure of the public defender to amend his pro se petition is proof of incompetence. But this is not so. There must be a showing that the petition could be amended to state a cause on which post-conviction

relief can be granted. People v. Goodwin, 5 Ill.App.3d 1091, 284 N.E.2d 430. No such showing was made here.

Petitioner's further claim that his constitutional right to a speedy trial may have been violated and that his trial counsel may have carelessly waived the application of the four-term rule is also without merit.

A constitutional right, like any other right of an accused, may be waived and a voluntary plea of guilty waives all errors or irregularities that are not jurisdictional (People v. Brown, 41 Ill.2d 503, 505, 244 N.E.2d 159; People v. Dunn, 52 Ill.2d 400, 402, 288 N.E.2d 463), including a claimed failure to give defendant a speedy trial (People v. DeCola, 15 Ill.2d 527, 531, 155 N.E.2d 622). In addition, before accepting a plea of guilty the trial court does not have to advise a defendant of his rights under the four-term act. People v. Scott, ___Ill.App.3d, ___N.E.2d___ (Third Division, No. 57542, July 12, 1973).

The record of the change of plea proceeding shows that petitioner knowingly and voluntarily entered a plea of guilty: petitioner was represented by private counsel and was fully advised of the charges against him, of his right to a jury trial or a bench trial, of his right to confront the witnesses and cross-examine them, of his right to testify in his own behalf and to call witnesses and of the minimum and maximum sentences for each offense charged and that they could run consecutively.

The question of a speedy trial or the four-term rule was waived by the guilty plea which was understandingly and knowingly made after adequate admonitions were given. The claim of prejudice, in that the trial court improperly admonished petitioner that he could serve consecutive sentences for the charges of rape and indecent liberties, is without merit because the trial court in

sentencing him stated: "Since the indecent liberties charge will merge with the rape, there will be no sentence on that judgment."

Petitioner also claims error in that the trial record contains no factual recitation as required by Rule 402(c) and People v. Dugan, 4 Ill.App.3d 45, 280 N.E.2d 239. The plea of guilty was accepted on August 17, 1970. Rule 402 did not become effective until September 17, 1970, and is not retroactive (People v. Palmer, 8 Ill.App.3d 98, 102, 289 N.E.2d 260; Ill.Rev.Stat., 1971, ch.110A, par. 402). The plea in Dugan was after that date.

On the hearing in aggravation and mitigation, petitioner's attorney stipulated that the facts and allegations in each count were true, correct and sufficient to support a finding of guilty, that if witnesses were called by the State they would testify to facts sufficient to prove the allegations of each of the counts and that these facts would be the same as recited to the court in the conference. No prejudice has been shown to result from this. In a conference between the court, the assistant State's attorney and petitioner's privately retained counsel, the assistant State's attorney stated that he would recommend, if the petitioner pled guilty, a sentence of not less than six nor more than twelve years on the rape charge and concurrent sentences of four years to four years and one day on the bail jumping charges, the latter to run concurrent to the rape sentence. The petitioner agreed to this and the State so recommended. The trial court followed the recommendations.

Petitioner was ably represented by the public defender at the post-conviction proceeding. The judgment is affirmed.

JUDGMENT AFFIRMED.

*EGAN, J., took no part.

PEOPLE OF THE STATE OF ILLINOIS,	)	APPEAL FROM
Plaintiff-Appellee,)	
	)	CIRCUIT COURT,
vs.)	
	)	COOK COUNTY.
PRINCE PARSONS,)	
Defendant-Appellant.)	)	HON. JOHN J. McDONNELL,
		Presiding.

Prince Parsons was charged with the offense of gambling in that he knowingly permitted certain premises under his control to be used for illegal gambling operations in violation of Section 28-3 of the Criminal Code (Ill.Rev.Stat. 1971, ch. 38, par. 28-3). After a bench trial the defendant was found guilty and sentenced to the House of Correction for thirty days.

Prior to trial a hearing was held on defendant's motion to suppress. Police Officer Dennis Burke testified that in the past the premises at 534 East 42nd Street, Chicago, an abandoned apartment building, had notoriously been known for illegal card games; and that he had participated in two or three prior arrests at said location. On October 1, 1971 at about 10:00 P.M., he and three other police officers went to the location and observed the abandoned building from an alleyway. There were lights on the third floor, but the other two floors were dark. They could see a number of people through the window standing in a circle. He heard someone say "I'll bet there was twenty bucks in the last pot."

The police officers determined there was a violation of the

law. Burke and another police officer went up the rear stairs to the third floor. There was a window right next to the rear door. Burke looked in the window and saw the defendant who was standing sideways to the window with an undetermined amount of money in his hand. There was between \$5 and \$25 on the table, as well as some cards. Burke testified that Judy Robinson had cards in her hands and Mary McAfee was seated at the table but did not have any money or cards in front of her. Samuel Blake was standing behind Mrs. McAfee, but Burke did not see any money or cards in his hands.

The defendant was standing up and taking money from the pot and putting it into a small treasure chest type plastic box, commonly called a cut box. The police officers forced the door open. There were approximately 15 people in the room. They and the defendant were arrested and advised of their constitutional rights.

Mary McAfee testified that she was in the building on the night of the arrest. She said that George Dawson had rented the apartment and that there was furniture in the apartment, beds, TV and radio and all of the things that are usually in an apartment.

The court denied the motion to suppress.

Counsel for the People and the defendant stipulated that the testimony heard on the motion to suppress would be the same as that heard at the trial, except for hearsay.

At the trial Police Officer Burke testified that People's Exhibit No. 1 for identification was the box which was on the table at 534 East 42nd Street, Chicago; and that he saw the defendant put unknown amounts of United States currency into this box; that People's Exhibit No. 2 for identification was a deck of playing cards, which were distributed on the table at the time of the arrest; and that People's Group Exhibit No. 3 was \$180 of United States

currency which was on the table and in the possession of the defendant at the time of the arrest. The foregoing exhibits were received in evidence.

On cross-examination Police Officer Burke testified that from his examination of the apartment he was able to determine no one lived there; that there was no clothing or beds, and that there was one sofa and a card table. Burke testified that he did not see any bets made; that he did not see anyone taking any money out of the center of the table or putting any money into the center of the table; and that he did not see any cards being dealt, shuffled or distributed to the various people around the table.

The defendant testified that he lived at 10643 Cottage Grove, Chicago; that he is a construction worker; that he was in the apartment when the police officers came in; and that he was playing cards prior to the time the police officers entered. He ran when the police officers broke in but he was arrested by Police Officer Burke. The defendant testified that there was a bed, a couch, radio and TV in the third floor apartment. On cross-examination he testified that he was playing cards, but that he did not put money in the cut box.

Mary McAfee testified that she lived at 4314 South Langley, Chicago and worked for the Board of Education; that she went to the apartment that evening to get her daughter because Mrs. McAfee had taken the daughter's baby to the hospital.

On cross-examination Mrs. McAfee testified that they were playing cards but no money was involved, they were just playing for fun; that she did not see the cut box; and that she did not see any money on the table.

Fred Branch testified that he lived at 1430 East 42nd Place,

Chicago and he worked for the Magikist Rug Company. He said that he had been up to the apartment before and had played cards there before, but was not playing on that particular evening.

Judy Robinson testified that she lived at 6407 Justine Avenue, Chicago; that she was in the apartment when the arrest took place; that the people were playing cards without money; and that she came up to the apartment that evening because her boyfriend lived there. He lived on the third floor with three or four other people; that she is familiar with the apartment; that there were beds, furniture, TV and radio; and that there were shades on the windows. When the police came in she was sitting down at the table but there was no gambling; and that she did not see the cut box on the table. There were cards on the table but no money because they were playing for fun.

The defendant argues that the State failed to prove the defendant was in control of the premises and, secondly, that there was no proof that gambling took place on the premises. The State argues that the evidence shows that the defendant was present in the apartment and exercised control over it by running a card game.

Section 28-3 of the Criminal Code (Ill.Rev.Stat. 1971, ch.38, par. 28-3) provides that a "gambling place" is any real estate, vehicle, boat or any other property whatsoever used for the purpose of gambling; and that any person who knowingly permits any premises under his control to be used as a gambling place is subject to a fine or imprisonment. In the case at bar the defendant had control of the premises and knowingly permitted the use of the same for gambling purposes. People v. Smith, 50 Ill.App.2d 361, 200 N.E.2d 748; People v. Roti, 2 Ill.App.3d, 264, 276 N.E.2d 480.

The defendant contends that the evidence tends to show that George Dawson rented the apartment and, therefore, the defendant

could not be in control. This is not a necessary or correct conclusion. The night of the raid and when the gambling took place George Dawson was not in the apartment. The evidence clearly shows that the defendant was in the apartment and was exercising control over it by running a card game for money.

The record discloses that the apartment was located in an abandoned building. Police Officer Burke had observed people standing in a circle and heard conversation of a gambling nature. Burke observed the defendant taking money out of the "pot" on the table and putting it into a "cut box." Cards and money were observed on the table as well as in the hands of certain persons sitting around the table. The defendant admitted that he was playing cards prior to the entry by the police. Other witnesses testified that cards and dice were played in the apartment on other occasions, as well as on that particular evening.

In a bench trial, the determination of the credibility of the witnesses and the weight to be given their testimony is committed to the trial court and a reviewing court will not set aside a guilty finding unless the proof is so unsatisfactory, improbable or implausible as to justify a reasonable doubt as to the defendant's guilt. People v. Roti, 2 Ill.App.3d 264, 271, 276 N.E.2d 480; People v. Smith, 50 Ill.App.2d 361, 365, 200 N.E.2d 748; People v. Catlett, 48 Ill.2d 56, 64, 268 N.E.2d 378. In the case at bar there was ample evidence to support a guilty finding beyond a reasonable doubt.

The defendant cites People v. Perry, 34 Ill.2d 229, 215 N.E.2d 229 and People v. Dante, 35 Ill.2d 538, 221 N.E.2d 409 in support of his contention that he was not proven guilty of being a keeper of a gambling place. Neither case is applicable to the facts in the case at bar. In the Perry case the court held (34 Ill.2d 233) that the

evidence left too much to inference and speculation, and one should not be deprived of his liberty or held guilty of a crime on so tenuous a basis. In the Dante case the judgment was reversed because of the failure of any of the State's witnesses to identify the defendant.

Here the evidence clearly shows that the defendant was in control of the premises and that there was gambling on the premises. Under such circumstances the trial court properly found the defendant guilty of being a keeper of a gambling place.

The defendant also argues that it was error of the trial court not to conduct a hearing in mitigation and aggravation. In People v. Parr, 130 Ill.App.2d 212, 264 N.E.2d 850, the court held that the defendant's failure to request a hearing in aggravation and mitigation constituted a waiver of his right to such a hearing. Other cases to the same effect are: People v. Nelson, 41 Ill.2d 364, 367, 243 N.E.2d 225; People v. Fuca(Thomas), 43 Ill.2d 182, 185, 251 N.E.2d 239. In the case at bar, the record shows that the defendant did not request a hearing in aggravation and mitigation and, therefore, it had been waived.

There is no reversible error. The judgment is affirmed.

JUDGMENT AFFIRMED.

*HALLETT, J. took no part.

58252

ESTATE OF JAMES KAS, DECEASED,)	
	)	APPEAL FROM
PETITION FOR CITATION TO)	
RECOVER PROPERTY,	)	CIRCUIT COURT,
)	
Stella Kas, Administratrix,	)	COOK COUNTY.
Petitioner-Appellee,)	
	)	HONORABLE ANTHONY J. KOGUT,
vs.	)	Presiding.
)	
John Kas and Sam Kas,)	
Respondents-Appellants.))	



MR. PRESIDING JUSTICE BURKE delivered the opinion of the court:

This is an appeal from an order granting the petition of the Estate of James Kas for a citation to recover property. The court determined that the decedent and his two brothers were partners in investing money. The court ordered the brothers to transfer the decedent's one-third interest in certain stocks and in a savings certificate to his estate. Both the stocks and the savings certificate were registered in joint tenancy with the right of survivorship. The surviving brothers, the remaining joint tenants, appeal on the grounds that the evidence was insufficient to find the existence of a partnership and that, even if a partnership existed, the property should pass to the surviving partners.

The facts are as follows. In the 1940's the three Kas brothers orally agreed to run a grocery store in partnership, sharing equally in the profits. John withdrew from active management of the store in 1960. The two other brothers continued to operate the store until it was sold in 1970. Prior to 1960 the brothers pooled funds to invest in securities, registered in their names as joint tenants with the right of survivorship. The savings certificate, which represented the proceeds of the sale of the store plus additional contributions from the three brothers, was acquired in 1970 and was also held in joint tenancy with the right of survivorship. A parcel of land was purchased in 1951 with title in a land

trust of which the brothers and their wives were the beneficiaries. This land is not part of the property sought to be recovered. Income from the properties was reported on a partnership return and on the individual's returns as to the brothers' respective shares. James Kas died on September 14, 1971. The surviving brothers reported the joint tenancy property on an Illinois inheritance tax return, paid the tax and had the title to the property transferred to their names. At a hearing in the Probate Division the surviving brothers and Stella Kas, James' widow and the administratrix of his estate, testified. The facts are taken largely from the briefs filed by the parties at the trial level, since no report of proceedings or stipulated statement of facts was filed as part of this record. See Kahn v. Deerpark Inv.Co., 115 Ill.App.2d 121, 253 N.E.2d 121.

The appellants contend that the court erred in finding the existence of a partnership to invest in securities and deposit money for interest income. Essentially, they are arguing that this finding was against the manifest weight of the evidence. But the appellants expand on this argument by asserting that the narrow issue at trial was whether the property cited in the appellee's petition was part of the assets of the original grocery store partnership. The only reference to this issue appears in the appellants' trial court brief. There is no other indication in the record that this was the issue at trial. It appears from the appellee's trial court brief that the issue was meant to be broader. There was no attempt in the petition to trace the grocery profits through the investments. The parties agree that personal funds of the brothers were added to the grocery profits in the process of making various investments, including the savings certificate, which represented, in part, the proceeds of the sale of the grocery

store. Thus, it appears that the appellants' attempt to limit the issue in this fashion was and is erroneous.

We are left with the broader contention that the existence of the investment partnership is contrary to the manifest weight of the evidence. The general rule is that the existence of a partnership is a question of fact based on the intent of the parties. (Cline v. Cline, 12 Ill.App.2d 231, 139 N.E.2d 828.) There was no written partnership agreement. The parties concede that the three brothers were partners in the grocery store operation. The designation of their investment activities as a partnership following a hearing in which testimony was heard cannot be said to be contrary to the weight of the evidence, assuming as we must that anything omitted from the record before us favors the appellee. Perez v. Janota, 107 Ill.App.2d 90, 246 N.E.2d 42.

The appellants direct our attention to another case in which no report of proceedings was filed. (Kahn v. Deerpark Inv.Co., 115 Ill.App.2d 121, 253 N.E.2d 121.) Reliance on this case is misplaced, however, since the court there was reviewing a question of law, an interpretation of an Illinois statute. We have here a question of fact, whether a partnership existed. Our function in reviewing factual determinations is to examine whether they are supported by the evidence. We so find in this case.

For the same reason, we reject the appellants' second and third contentions that even if a partnership existed, the survivorship provisions regarding the joint tenancy property should be enforced. Although the joint tenancy agreements with the broker (as to the securities) and the bank (as to the savings certificate) carry a presumption of validity, the creation of a joint tenancy depends on the intent of the parties at the time of creation. That intent is a question of fact. Thus, the presumption that an instrument purporting to create a joint tenancy actually did so may be rebutted

by clear and convincing evidence. (In Re Estate of Rupp, 4 Ill. App.3d 648, 281 N.E.2d 717.) Within this framework of law, the trial court found that the presumption of a valid joint tenancy had been rebutted, based on the evidence before it. We find no reason in the record to reverse the court's determination.

The appellants argue that there is a statutory basis for approving the joint tenancy and transferring the property to the survivors.(Ill.Rev.Stat., 1971, ch. 76, par. 2.) This argument ignores the fact that the statute on which they rely has been interpreted by the courts to leave open the possibility of dispelling the presumption of a valid joint tenancy. The Illinois Supreme Court has said:

"We do not mean to imply that where joint ownership is set up in conformity with the statutory provisions, a court of equity is thereby foreclosed from looking behind the form of the transaction and determining questions of real and beneficial interest as between the parties." (Frey v. Wubben, 26 Ill.2d 62, 70, 185 N.E.2d 850, 855.)

In that decision, the court held that the statute cited by the appellants did indeed provide for the creation of joint tenancies if the required form was followed. As noted, however, this does not preclude a court from judging the reality of the transactions. The trial court in this case was satisfied that equitable relief was warranted and ordered transfer of the property to the decedent's estate. We find no reason to disturb this order.

For the reasons stated the judgment is affirmed.

JUDGMENT AFFIRMED.

GOLDBERG and HALLETT, JJ., concur.

58412



PEOPLE OF THE STATE OF ILLINOIS
ex rel. ROBERT T. KEYES,

Relator-Appellant,

v.

JOHN J. TWOMEY, Warden, ILLINOIS
STATE PENITENTIARY, Joliet,
Illinois,

Respondent-Appellee.)

) APPEAL FROM THE
) CIRCUIT COURT
) OF COOK COUNTY.

) HONORABLE
) RICHARD J. FITZGERALD,
) PRESIDING.
)
)
)

PER CURIAM * (FIRST DIVISION, FIRST DISTRICT):

Robert T. Keyes (hereinafter "relator") was found guilty of murder and was sentenced to a term of 14 years to 20 years in the penitentiary on August 25, 1967. On July 26, 1972, relator filed a pro se petition for writ of habeas corpus and, on motion of respondent, the petition was dismissed. Relator appealed.

The Public Defender of Cook County was appointed relator's counsel on appeal and has filed in this court a motion for leave to withdraw as appellate counsel; the motion is supported by a brief filed pursuant to Anders v. California, 386 U.S. 738, in which appellate counsel states that the only question which can be raised from the record on this appeal is, "Whether the relator was denied procedural due process of law in his habeas corpus hearing." The brief concludes that the trial court did not abuse its discretion in dismissing the habeas corpus petition. Relator was forwarded copies of the motion and brief and was allowed additional time within which to file any points he wished in support of the appeal. Relator has not responded.

The sole jurisdictional ground raised by relator in his petition of writ of habeas corpus relates to the alleged failure of the grand jury foreman to sign the murder indictment returned against relator, as required by statute. (Ill. Rev. Stat. 1965, ch. 38, par. 112-4 (c).) However, relator's references in his petition relate to copies of the indictment, whereas the original

indictment, a fact admitted to by relator's counsel at the hearing on the petition, was signed by the foreman of the grand jury. This ground consequently presented no issue upon which the trial court could have granted relief under the habeas corpus statute. Ill. Rev. Stat. 1971, ch. 65, par. 22.

Also raised as grounds for relief in the petition for habeas corpus was the alleged violation at trial of certain of relator's constitutional rights. It has been consistently held that habeas corpus is not available to remedy errors of that nature; unless it is shown that the judgment of conviction was void or that something has happened since its rendition to entitle the prisoner to his release, the court lacks jurisdiction to entertain a petition for habeas corpus. People ex rel. Jefferson v. Brantley (1969), 44 Ill.2d 31, 253 N.E.2d 378; People ex rel. Skinner v. Randolph (1966), 35 Ill.2d 589, 221 N.E.2d 279. We are in agreement with appellate counsel's position that the trial court did not abuse its discretion in dismissing relator's petition for habeas corpus.

In accordance with our duty under the Anders decision, our independent review of the record in the instant matter reveals no additional grounds upon which the appeal may be predicated. We are of the opinion that the appeal is frivolous and wholly without merit.

The motion of the Public Defender of Cook County for leave to withdraw as appellate counsel is accordingly allowed, and the judgment of the circuit court of Cook County is affirmed.

MOTION ALLOWED.
JUDGMENT AFFIRMED.

ABSTRACT ONLY.

* Egan, J., took no part.



58412

PEOPLE OF THE STATE OF ILLINOIS
ex rel. ROBERT T. KEYES,

Relator-Appellant,

v.

JOHN J. TWOMEY, Warden, Illinois
State Penitentiary, Joliet,
Illinois,

Respondent-Appellee.

) APPEAL FROM THE
) CIRCUIT COURT
) OF COOK COUNTY.

) HONORABLE
) RICHARD J. FITZGERALD,
) PRESIDING.

SUPPLEMENTAL OPINION

PER CURIAM * (FIRST DIVISION, FIRST DISTRICT):

Robert T. Keyes (relator) was found guilty of the offense of murder and was sentenced to a term of 14 years to 20 years on August 25, 1967. He filed a petition for writ of habeas corpus on July 26, 1972; the petition was dismissed and relator appealed. This court subsequently affirmed the dismissal of that petition and allowed appellate counsel's motion for leave to withdraw in accordance with the procedures established by Anders v. California 386 U.S. 738. See People ex rel. Keyes v. Twomey (1973), 14 Ill. App. 3d 738, 303 N.E. 2d 211.

After the date of filing of the original opinion in this case, and several weeks after the date set by this court for relator to respond to appellate counsel's motion for leave to withdraw and to this court's notice to relator allowing him time to file any points he desired in support of the appeal, relator filed in this court a pro se document styled "Petition for Summary Modification of Sentence." Relator therein requested this court to reduce his conviction for murder to that of involuntary manslaughter and, in turn, to reduce the sentence imposed in accordance with the terms of the Unified Code of Corrections. (Ill. Rev. Stat. 1972 Supp., ch. 38, par. 1001-1-1 et seq.) That Petition does not refer to the original opinion filed in this case, it was clearly not intended as a rehearing in this matter, and the time sequence

involved indicates that the Petition was intended by relator as a response to this court's notice to him in connection with appellate counsel's motion for leave to withdraw; the Petition shall be treated as such in this Supplemental Opinion.

As noted in this court's original opinion in this case, matters of a non-jurisdictional nature are not cognizable in a proceeding for writ of habeas corpus. People ex rel. Keyes v. Twomey (1973), 14 Ill. App. 3d 738, 303 N.E. 2d 211; People ex rel. Jefferson v. Brantley (1969), 44 Ill. 2d 31, 253 N.E. 2d 378; People ex rel. Skinner v. Randolph (1966), 35 Ill. 2d 589, 221 N.E. 2d 279. However, as held by the Supreme Court in People ex rel. Palmer v. Twomey (1973), 53 Ill. 2d 479, 292 N.E. 2d 379, an ineptly drawn pro se petition for writ of habeas corpus may be treated as a request for relief under the Post-Conviction Hearing Act, where otherwise applicable and appropriate. Ill. Rev. Stat. 1971, ch. 38, par. 122-1 et seq.

In the "Petition for Summary Modification of Sentence" filed by relator, he argues initially that the denial to him of the benefits of the sentencing provisions of the Unified Code of Corrections, based solely upon the question of whether or not his case had reached a "final adjudication prior to January 1, 1973," is an arbitrary classification and is contrary to equal protection and due process of law. However, while relator's argument relative to the Unified Code's applicability to adjudication on or after January 1, 1973, is not accurate, he is in no position to complain in this regard. He was found guilty of the offense of murder and he was sentenced to a term of 14 years to 20 years. A term of 14 years is the minimum term of incarceration to which a person convicted of murder could be sentenced under both the Unified Code of Corrections and the statute pursuant to which relator was found guilty and sentenced; the same holds true for the maximum term to

which he could be sentenced under either statute. (Ill. Rev. Stat. 1965, ch. 38, par. 9-1(b); Ill. Rev. Stat. 1972 Supp., ch. 38, par. 1005-8-1(c) & (b).) Since relator would be in no better position under the Unified Code than he was under the statute pursuant to which he was found guilty and sentenced, he is in no position to argue that the terms of the Unified Code discriminate against him in this regard.

Relator's further argument that his conviction should have been for the offense of involuntary manslaughter, rather than for that of murder, is without merit. Relator bases that argument on the "circumstances" surrounding the homicide in question, in that those circumstances allegedly fail to disclose the presence of the necessary intent on his part to commit the offense of murder, as required by statute. (Ill. Rev. Stat. 1965, ch. 38, par. 9-1(a).) This argument raises neither a jurisdictional question, cognizable in a habeas corpus proceeding, nor a constitutional question, cognizable under the Post-Conviction Hearing Act. Further, the instant record fails to factually support this argument. This was an issue which should have been raised on direct appeal from the judgment of conviction, and although failure to perfect such direct appeal does not foreclose the advancement of constitutional claims in a post-conviction proceeding (People v. Rose (1969), 43 Ill. 2d 273, 253 N.E. 2d 456), the issue does not involve a question cognizable in the instant collateral attack upon relator's conviction.

The case of People v. Bailey (1965), 56 Ill. App. 2d 261, 205 N.E. 2d 756, cited in the Petition in support of this argument is inapposite on its facts to the instant case.

It should be noted in passing that the Supreme Court has recently held that the question of excessiveness of sentence is not cognizable in a post-conviction proceeding (People v. Ballinger (1973), 53 Ill. 2d 388, 292 N.E. 2d 400); it has also been held by

the appellate court that the sentencing provisions of the Unified Code of Corrections are not applicable to post-conviction proceedings. People v. Null (1973), 13 Ill. App. 3d 60, 299 N.E. 2d 792.

We otherwise adhere to the decision in our original opinion filed in this case: People ex rel. Keyes v. Twomey (1973), 14 Ill. App. 3d 738, 303 N.E. 2d 211. The motion of appellate counsel for leave to withdraw is allowed and the judgment of the circuit court of Cook County is affirmed.

Motion allowed,
judgment affirmed.

Abstract only.

*Egan, J., took no part.

57827

PEOPLE OF THE STATE OF ILLINOIS,	)	APPEAL FROM	
Plaintiff-Appellee,)		
	)	CIRCUIT COURT,	ABST
vs.)		
	)	COOK COUNTY.	
EMMETT BROWN,)		
Defendant-Appellant.	)	HON. ROBERT J. COLLINS,	
		Presiding.	

*PER CURIAM (First Division, First District):

Emmett Brown was found guilty after a jury trial of the offense of the unlawful sale of a narcotic drug, namely, heroin, in violation of section 22-3 of the Criminal Code, and was sentenced to a term of two years in the penitentiary. (Ill.Rev.Stat. 1969, ch. 38, par. 22-3.) On this appeal he contends that the trial court erred in refusing to give to the jury Defense Instruction Number 2, that he was not proved guilty beyond a reasonable doubt, and that his sentence must be reduced in light of the current Unified Code of Corrections.

At the trial, John Harris, an admitted narcotics addict and convicted felon, testified for the People that on July 8, 1971, he informed Chicago Police Officers Lett and Ellis that he would be able to complete a purchase of narcotics, that he was "strip searched" by the officers at police headquarters and given \$10 in pre-recorded currency, and that he and the officers proceeded in a private automobile to the corner of 46th Street and Michigan Avenue in the city. Harris alighted from the vehicle, proceeded to the front of a building at 4631 Michigan Avenue where he met the defendant, and gave the defendant the \$10. The defendant counted the money, told the witness to wait, proceeded to a building at 4609 Michigan Avenue, returned a few minutes later and gave the witness a tinfoil packet. After departing the defendant's company the witness returned to the police officers and gave the

tinfoil packet to Officer Lett. On cross-examination the witness was questioned extensively as to his past use of drugs; his past felonies; whether he was paid for his services to the police; his employment; and the alleged aliases used by him in the past. He was also questioned concerning the instant purchase from the defendant. His answers did not vary substantially from those given by him on direct examination.

Officer Lett testified for the People that on July 8, 1971, he and Officer Ellis received information from John Harris, subjected Harris to a "strip search," gave him pre-recorded currency, and proceeded with him in the witness' private automobile to the corner of 46th Street and Michigan Avenue. The witness and Harris alighted from the vehicle as Officer Ellis drove the vehicle away, Harris proceeded to 4631 Michigan Avenue and the witness walked to a point across the street from Harris, about 75 feet away. Officer Lett testified that he observed Harris meet the defendant at the 4631 address, that Harris gave the defendant money, that defendant walked to and entered a building at 4609 Michigan Avenue, and that defendant returned to Harris a few minutes later, whereupon the witness observed Harris' and defendant's hands "meet." The officer did not see Harris in contact with anyone else during that period. Harris then met the witness at Wabash Avenue where Harris turned over a tinfoil packet, the contents of which were later field tested by the officers, resulting in a "positive reaction." Officers Ellis and Lett then proceeded to the 4631 Michigan Avenue address where they placed the defendant under arrest. The officer's testimony was substantially the same on cross-examination.

Officer Ellis' testimony for the People in all material aspects corroborated that given by Officer Lett, except that Officer Ellis, after parking the automobile in which they had arrived on

46th Street, positioned himself at the corner of 46th Street and Michigan Avenue, about 75 yards from where he observed Harris and the defendant in front of the 4631 Michigan Avenue address. The officer testified that he observed the arms of the two men "move" when they first met and that their arms again "met" after defendant had returned from the 4609 Michigan Avenue address. The officer also testified that the building at 4609 Michigan Avenue was searched and that the pre-recorded funds were not recovered.

A police chemist testified that the tinfoil packet received at police headquarters from the two officers contained .21 grams of heroin. It was stipulated that defendant was 49 years of age and defendant offered no other evidence in his own behalf. It was also brought out in aggravation and mitigation that defendant had been convicted of the unlawful sale of a narcotic drug in 1959 and of the unlawful possession of a hypodermic needle in 1970, and that defendant was addicted to narcotics.

Defendant initially contends that it was error for the trial court to refuse to give to the jury Defense Instruction Number 2, which reads as follows:

"The Court instructs the jury that the testimony of an admitted narcotic addict should be received by the jury with great caution and suspicion and it should be weighed with great care as such evidence is subject to imperfection and mistakes. The jury ought not to convict upon such testimony alone, unless, after a careful examination of such testimony you are satisfied beyond a reasonable doubt of its truth, and that you can safely rely upon it."

Defendant argues that the foregoing instruction correctly states the law of Illinois as applied to narcotic addict-informers and that the jury was entitled to be instructed in that regard. That instruction is not taken from the Criminal, Illinois Pattern Jury Instructions.

While it is true that, as defendant contends, the testimony of a narcotic addict-informer, or an accomplice, must be viewed

with "great caution" and "close scrutiny," the tendered instruction goes beyond such sanctioned terminology by labeling the informer's testimony as "suspect" and "subject to imperfections and mistakes." Defendant has cited no authority which would justify the use of the latter language of the instant tendered instruction, which would have the effect of singling out and condemning such testimony. See People v. Reddick, 107 Ill.App.2d 123, 245 N.E.2d 873; People v. Phillips, 129 Ill.App.2d 455, 263 N.E.2d 353; People v. Faulkner, 12 Ill.2d 176, 145 N.E.2d 632; People v. Crump, 5 Ill.2d 251, 125 N.E.2d 615. The court was right in refusing to give Defense Instruction Number 2, See People v. Collins, 9 Ill.App.3d 467, 292 N.E.2d 441.

Defense Instruction Number 8 (non-I.P.I.) was given to the jury, which instructed as to the testimony of an informer, and People's Instruction Number 2 (I.P.I., Criminal 1.02) was also given to the jury, which instructed generally as to the testimony of a witness in light of any bias, interest or prejudice he may have. The jury was properly instructed as to the credibility of the witnesses under the circumstances of this case.

Defendant also contends that his guilt was not proved beyond a reasonable doubt, basing this contention upon the foregoing alleged error in instructing the jury and upon the "inherently unreliable testimony" of the informer, Harris. As noted the addict-informer's testimony is not wholly unreliable because of his status as an addict-informer. His testimony is corroborated by the evidence offered by the police officers. The jury believed the evidence adduced by the People, which was sufficient to support defendant's conviction beyond a reasonable doubt. See People v. Banks, 103 Ill.App.2d 180, 186, 243 N.E.2d 669. (See also, e.g., People v. Bazemore, 25 Ill.2d 74, 182 N.E.2d 649.)

Defendant attacks the length of his sentence, contending that the maximum term imposed should be reduced to a period of six years to conform to the Unified Code of Corrections provision that the sentence imposed upon a Class 3 [sic] felony should not exceed the ratio of one-to-three between the minimum and the maximum terms imposed.

The Controlled Substances Act classifies the instant offense as a Class 2 felony (Ill.Rev.Stat. 1972 Supp., ch. 56 1/2, par. 1401(b)), which also provides for no greater than a one-to-three ratio between the minimum and maximum terms set (Ill.Rev.Stat. 1972 Supp., ch. 38, par. 1005-8-1); the ratio between the instant minimum and maximum terms is less than that prescribed by statute. Further, defendant has a past record of narcotics offense convictions, and both the Controlled Substances Act and the Unified Code of Corrections provide for an enhancement of penalties under such circumstances. (Ill.Rev.Stat. 1972 Supp., ch. 38, par. 1005-8-1(c)(3); ch. 56-1/2, par. 1408.) Defendant's sentence of two years to ten years is not excessive, and the maximum term imposed permits the parole board adequate leeway in determining whether, after defendant's service of the minimum term imposed, he has been sufficiently rehabilitated to be returned to society, as sought by defendant in his brief that he be afforded the benefit of parole.

For these reasons the judgment is affirmed.

JUDGMENT AFFIRMED.

* HALLETT, J., took no part.

OLD ROSE DISTRIBUTING CO.,	)	APPEAL FROM
Plaintiff-Appellee,)	
	)	CIRCUIT COURT,
vs.)	
	)	COOK COUNTY.
GEORGE J. KALLAS and)	
GUS KRITIKOS, individually and	)	HON. FRANK B. MACHALA,
d/b/a LE PARASOL,	)	Presiding
Defendants,)	
GEORGE J. KALLAS,)	
Defendant-Appellant.))	



*PER CURIAM(First Division, First District):

A petition under Section 72 of the Civil Practice Act was filed by George J. Kallas (petitioner) to vacate a default judgment entered in a contract action in favor of Old Rose Distributing Co., (plaintiff) and against petitioner and Gus Kritikos (Kritikos) in the amount of \$743.02 for merchandise allegedly sold by plaintiff to petitioner and Kritikos. The relief sought by the petition, as amended, was denied and petitioner appeals.

The complaint in contract was filed by plaintiff on May 26, 1971. Service of summons was had personally on both petitioner and Kritikos on June 2, 1971, the summons reflecting that they were to be served at "15408 Park Avenue, Harvey, Illinois." Petitioner filed a pro se appearance on June 23, 1971, which was the return date set forth in the complaint, the appearance noting petitioner's address as "546 West 136th Street, Riverdale, Illinois."

On November 5, 1971, the contract action was dismissed for want of prosecution and on November 10, 1971, plaintiff filed a "motion of course" to vacate that dismissal and to have the matter set down for trial. The notice of the motion to vacate the dismissal was addressed to petitioner at the Harvey address. The order dismissing the contract action was vacated and the matter was set for trial on December 14, 1971, on which date judgment by default was entered for plaintiff and against petitioner and Kritikos in the above stated

amount.

On August 8, 1972, plaintiff filed an affidavit for garnishment in the amount of \$802.82 against the Union National Bank (garnishee) wherein petitioner was alleged to have had an account; petitioner's "last known address" was listed on the affidavit at the Riverdale location. The garnishee answered on August 29, 1972, that it held sufficient funds in a checking account belonging to petitioner; judgment was entered for plaintiff and against the garnishee in the requested amount; the judgment was satisfied by the garnishee on September 5, 1972; and the satisfaction of judgment was filed with the court on September 11, 1972.

On October 11, 1972, petitioner filed a sworn petition to vacate the December 14, 1971, judgment alleging in essence that he was advised personally by the court on November 5, 1971, that the contract action was being dismissed as to him; that the action was in fact so dismissed; that the dismissal was vacated and an ex parte judgment thereafter entered against him; that he received no notice that plaintiff intended to have the dismissal order vacated, because the notice of the motion to vacate the dismissal order was sent to the petitioner at the Harvey address rather than at the Riverdale address; and that the first notice that petitioner received of the December 14, 1971, judgment was "when he was notified by his Bank that his account had been garnished," whereupon he contacted his attorney who "took the necessary steps to present this Petition." The petition requested that the December 14, 1971, judgment be vacated and that the matter be set for trial.

Petitioner was granted leave to file an amended sworn petition under section 72, which was filed on November 10, 1972. The amended petition re-alleged the matters contained in the original petition

and alleged in addition thereto that petitioner had a good and meritorious defense to the contract action, namely, he denied the allegations of the contract complaint and affirmatively stated that he neither purchased nor authorized the purchase of the merchandise in question, that he was not the partner of Kritikos, that prior to the invoice dates regarding the merchandise in question he sold the tavern business to Kritikos and had nothing further to do with him, that at the time of the sale of the business he was not indebted to the plaintiff, and that he did not owe the plaintiff the amount demanded in the contract complaint nor any other amount.

Hearing on the section 72 petition, as amended, was set for January 19, 1973, on which date the order appealed from was entered simply denying the petition and setting an appeal bond. The record does not disclose whether or not a hearing on the petition was in fact held.

Petitioner's initial contention is that service upon him of the notice of plaintiff's motion to vacate the dismissal of the contract action was improper since his address was listed on his appearance filed in the action at the Riverdale location whereas the notice of the motion was mailed to him at the Harvey location, thereby rendering all subsequent proceedings in the matter invalid. We disagree.

The failure of petitioner to receive the notice of the motion to vacate the dismissal was due to petitioner's own negligence. At the time petitioner's appearance was filed in the contract action, Circuit Court Rule 1.2 provided that where a written appearance is filed in a case, a copy of that appearance must be served in the manner required for the service of copies of pleadings. (Cir.Ct.R.1.2.) Supreme Court Rule 12 provides that proof of service must be filed with the clerk of the court and sets out the methods by which service may be

proved. (Ill.Rev.Stat. 1971, ch. 110A, par.12.)

No proof of service of the appearance upon plaintiff appears of record, and petitioner admits in his brief on appeal that no such service was made. The fact that petitioner filed his appearance pro se cannot aid him in this regard, since the record discloses that he in fact knew enough to file an appearance, that the appearance was filed on the last day for filing same, and that the appearance form filed contains printed language relative to the certification of service of the document upon other parties in the action. Although the trial file jacket shows that the court notified the plaintiff that petitioner had filed an appearance, there is nothing in the record to show that plaintiff had actual notice of what that appearance contained. Plaintiff initially served petitioner with summons of suit at the Harvey address, petitioner affirmatively responded to that service by filing his appearance, and the record does not disclose any fact which would have put plaintiff on notice that petitioner desired to be served with future notices in the action at an address other than where he was originally served.

Petitioner's contention that the motion to vacate the dismissal order should have been "formally made" is without merit. The record discloses that a "motion of course" was filed with the court to vacate the dismissal order and that petitioner was mailed a notice that said motion would be presented to the court. Section 68.3 of the Civil Practice Act provides for the making of such motions and does not require adherence to the strict formality for which petitioner contends. (Ill.Rev.Stat. 1971, ch. 110, par. 68.3.) Supreme Court Rule 183, cited by petitioner, has no bearing on the question of the form or contents of such a motion, as petitioner argues. (Ill.Rev.Stat. 1971, ch. 110A, par. 183.)

Petitioner also contends that his requested relief should have been granted since his amended petition was verified and since no response was filed thereto by plaintiff, thereby admitting all facts well pleaded in the petition.

Both the original and the amended petitions are defective on their faces. Neither was supported "by affidavit or other appropriate showing as to matters not of record" as required by subsection (2) of section 72. Further, neither petition recited facts showing that petitioner acted with due diligence in presenting the petition to the court. They do allege that petitioner first received notice of the December 14, 1971, judgment against him when the garnishee notified him that his account had been garnisheed, and that he turned the matter over to his counsel for the presentation of the petition to the court, but neither alleges the date on which the information was conveyed to petitioner from the garnishee. Two months elapsed between the institution of the garnishment proceedings by plaintiff and the filing of the original section 72 petition, and the petitions do not account for this delay.

It is well settled that a petition filed under section 72 of the Civil Practice Act must set forth sufficient facts to show both a meritorious defense and due diligence on the part of the petitioner. Union Oil Co. of California v. Lang, 132 Ill.App.2d 658, 662, 270 N.E.2d 609. While it is generally held that the failure to challenge a section 72 petition admits as true all facts properly pleaded therein, the petition must be sufficient in and of itself to warrant such a holding. Elliot Construction Corp. v. Zahn, 99 Ill.App.2d 112, 116, 241 N.E.2d 129. The instant petition was patently deficient, it did not allege matters sufficient to permit petitioner the relief requested, and the trial court properly denied relief thereunder.

Petitioner's final contention is that the court should be liberal in allowing him his day in court. However, petitioner's dilemma was the result of his own neglect to serve plaintiff with a copy of his appearance showing the new address at which he desired to be served; further, the section 72 petition, as noted, was deficient in several material respects. Under the circumstances, section 72 is not available to relieve petitioner of the results of his own mistakes and neglect. Esczuk v. Chicago Transit Authority, 39 Ill.2d 464, 467, 236 N.E.2d 719.

For these reasons, the judgment of the Circuit Court of Cook County is affirmed.

JUDGMENT AFFIRMED.

*PER CURIAM.

EGAN, J., took no part.

NO. 56207

PEOPLE OF THE STATE OF ILLINOIS,)
)
 Plaintiff-Appellant,)
)
 vs.)
)
 IVORY ADAMS,)
)
 Defendant-Appellee.)

APPEAL FROM
 CIRCUIT COURT
 COOK COUNTY

 HONROABLE
 KENNETH R. WENDT,
 PRESIDING.

PER CURIAM:



Defendant, Ivory Adams, was charged in a two-count indictment with the offenses of robbery and armed robbery, in violation of sections 18-1 and 18-2 of the Criminal Code, respectively. (Ill. Rev. Stat. 1969, ch. 38, pars. 18-1, 18-2.) A pretrial motion to dismiss the indictment was allowed, and the State prosecutes this appeal pursuant to Illinois Supreme Court Rule 604. (Ill. Rev. Stat. 1971, ch. 110A, par. 604.)

The sole question raised on appeal is whether the indictment was properly dismissed on the ground that defendant was denied due process of law by reason of a lapse of over five months between the date of the offense and the date of his arrest pursuant to a "stop order" (during which time defendant was allegedly available at his known residential address), which lapse allegedly prejudiced him in establishing an alibi defense.

The indictment charges, inter alia, that on November 6, 1969 in the County of Cook, the defendant took a purse and other personal items belonging to Rosemary Padula. The unsworn motion to dismiss the indictment, filed April 15, 1971 by defendant's counsel, alleged that the offense in question was committed on November 7 (sic), 1969; that a "stop order" was placed upon defendant by the police about that date; that he was placed under arrest for the offense on April 21, 1970;

that because of the delay between the date of the offense and the date of his arrest he was unable to reconstruct his activities on the date of the offense nor were his alibi witnesses able to recall his whereabouts on that date; and that he was thereby precluded from preparing his defense to the charges.

At the hearing on the motion to dismiss the indictment, defense counsel represented to the court that, after defendant was arrested in April 1970, he contacted persons in Champaign-Urbana, Illinois, to establish that he was with them on the date of the offense, but that, while they recalled that defendant was in that area in early November 1969, they were unable to recall the specific dates due to the passage of time. The trial court interposed a question dealing with the legality of the "stop order" placed upon defendant by the police.

Police Officer Eugene Nicoletti testified that on November 7, 1969 he interviewed Miss Padula and received from her the defendant's name and address as the perpetrator of the robbery; the officer testified that she also identified defendant from several photographs later shown to her. On November 8, 1969 the officer went to the address supplied by the victim and spoke to a woman who identified herself as the defendant's sister; the officer stated that he told the sister that defendant was wanted in connection with the robbery, that he related to her the details of the robbery, and that he left his calling card with her so that defendant could contact him. The officer further testified that he returned to that address sometime thereafter, and that he telephoned another address supplied to him where he spoke to a man who represented himself to be defendant's grandfather (also named Ivory Adams) and related the same information concerning

the defendant and the robbery to the reputed grandfather as he did to the sister. The officer stated that he made these contacts "a week or two" after the robbery, but that he did not receive word from the defendant thereafter.

The officer further testified that he placed a "stop order" upon the defendant about November 8 or 9, 1969, which he explained to be a police procedure whereby a person would be held by an officer making an arrest on another matter for the officer who placed the "stop order," but that the order would not, of itself, authorize an arrest of that person. The defendant was ultimately arrested by the officer's partner on April 21, 1970, after his arrest on an unrelated matter, and the officer was uncertain whether the criminal complaint filed against defendant was executed in November 1969 or in April 1970. The prosecutor told the court that the complaint had been signed in each said month. No warrant had been issued for defendant's arrest.

Defendant's testimony at the hearing may best be characterized as unresponsive, evasive, and, at times, unintelligible. He related that he was in and out of Chicago during the month of November 1969; that he was at his grandfather's house upon his return in the second or third week of November; that he telephoned Officer Nicoletti, but the officer was not in and the witness forgot about the matter; and that he spoke to his mother. Defendant was asked if his relatives told him that a police officer was looking for him and he replied, "Why, regardless, everybody in the neighborhood knew me. 'Did you do this, did you do that?' And what not and so I said no. I just got back in town." (sic) No direct testimony was elicited from the defendant relative to his having been unsuccessful in his attempt to secure alibi witnesses for the reason that they were unable to recall dates.

The hearing was recessed for two weeks because the court wished to be briefed on the question of the "stop order" procedure employed by the police. At the supplemental hearing the prosecutor argued that, if the defendant had knowledge of the fact that he was wanted for the offense in question through the efforts of Officer Nicoletti, then the question of the legality of the "stop order" was irrelevant to the motion to dismiss the indictment. The court commented at that latter hearing that "five months elapsed and he said where he was on April 23rd. Somebody says, 'I don't know.' March 15th, whatever the date. I'm worried about the overall picture. Isn't that his testimony, he went to the fraternity house?" (sic) In response to a question by the court as to where defendant went to ask "the people" concerning his whereabouts on the date in question, the defendant replied that he went to a dormitory (at the University of Illinois) in Champaign. The motion to dismiss the indictment on the grounds of prejudicial delay was allowed.

Mere delay between the date of the commission of an offense and the date of the suspect's arrest, without more, will not give rise to the probability of prejudice having resulted to him therefrom; actual prejudice must appear. People v. Love, 39 Ill. 2d 436, 235 N.E. 2d 819.

In the instant case, apart from the allegations contained in the unsworn motion to dismiss the indictment and the representations of defendant's counsel at the hearing (that defendant's prospective alibi witnesses were unable to recall the exact dates that defendant was in the Champaign-Urbana area due to the passage of time), the record contains no direct evidence that defendant was faced with such situation. Furthermore, defendant's own evidence shows that he was informed that he was wanted by the police upon his alleged

return to the city, that he was asked by relatives and neighbors whether he "did this (or) did that," and that he in fact telephoned Officer Nicoletti. It must also be noted that Officer Nicoletti testified that he made three attempts to contact the defendant within two weeks after the offense. There has been no showing by the defendant that the delay between the date of the commission of the offense and the date of his arrest prejudiced him in any manner. It is also significant to note that defendant's motion to dismiss was not filed until almost a year after his arrest. (United States v. Marion, 404 U.S. 307; United States v. Lewis, 406 F. 2d 486; People v. Jennings, ____ Ill. App. 3d ____, ____ N.E. 2d ____ (1st Dist., #56711, 5/24/73, page 4 of slip opinion.)) Under the facts adduced below, the trial court was in error in granting defendant's motion to dismiss the indictment.

In the cases cited by the defendant in support of the trial court's action, actual prejudice was shown to have resulted from the delays there involved. Ross v. United States, 349 F. 2d 210 (which was subsequently limited in effect by Tynan v. United States, 376 F. 2d 761), and People v. Hryciuk, 36 Ill. 2d 500, 224 N.E. 2d 250.

Defendant also argues that the failure of the prosecutor to brief the question of the legality of the "stop order" as requested by the trial court, and the fact that the trial court expressly stated that he could not believe that the officer believed the defendant committed the crime, and the fact that the prosecutor admitted that the police "probably" were wrong in not securing an arrest warrant, preclude the State from now arguing that the trial court improperly dismissed the indictment.

Neither the legality of the "stop order" nor the court's expression of disbelief as to whether the officer believed

defendant to have committed the offense has any bearing on whether the delay between the date of the offense and the arrest of the defendant was prejudicial to the defendant and whether the defendant knew he was being sought by the police. The officer testified that he made three attempts to contact the defendant within the two weeks succeeding the offense, and the evidence reveals that defendant had knowledge that he was being sought by the police. Further, defendant, in his motion to dismiss, was not challenging the legality of his arrest but was challenging the prejudicial inaction of the State in failing to cause his arrest when he was available for over five months after the commission of the offense. The cases cited by defendant in support of his contention in this regard are inapplicable to the situation at bar; People v. Jones, 9 Ill. App. 3d 387, 292 N.E. 2d 435; Coolidge v. New Hampshire, 403 U.S. 443.

For these reasons the order of the circuit court of Cook County dismissing the indictment is reversed and the cause remanded with directions to reinstate the indictment and for further proceedings not inconsistent with the views expressed herein.

Judgment reversed and cause remanded
with directions.

Second Division; Stamos, P.J., not participating.

Publish abstract only.

NO. 57049

PEOPLE OF THE STATE OF ILLINOIS,)
)
 Plaintiff-Appellee,)
)
 vs.)
)
 OSCAR HOBBS,)
)
 Defendant-Appellant.)

APPEAL FROM
 CIRCUIT COURT
 COOK COUNTY

HONORABLE
 JAMES J. MEJDA,



PER CURIAM:

Oscar Hobbs (defendant) was charged in a three-count indictment (#68-316) with two offenses of unlawful sale of a narcotic drug to Edward Thigpen and to Albert Cross, in violation of section 22-3 of the Criminal Code, and with a single offense of conspiracy with Edward Thigpen to unlawfully sell a narcotic drug to Albert Cross, in violation of section 8-2 of the Code. (Ill. Rev. Stat. 1965, ch. 38, pars. 22-3, 8-2.) Defendant waived trial by jury and, after a bench trial, he was found guilty of the offense of conspiracy to unlawfully sell a narcotic drug, the court expressly making no findings as to the other two counts of the indictment charging the unlawful sale of a narcotic drug. Sentencing on the finding was postponed until disposition of indictment number 63-2235, then also pending against defendant.

Indictment number 68-2235 charged defendant with the unlawful possession of a narcotic drug, in violation of section 22-3 of the Criminal Code, which offense was unrelated to those charged in the foregoing indictment. (Ill. Rev. Stat. 1967, ch. 38, par. 22-3.) Defendant entered a plea of guilty to the possession charge before the same judge who had found him guilty of the conspiracy offense and, after a hearing in aggravation and mitigation, defendant was sentenced to concurrent terms of four years to ten years upon the two findings of guilty. The appeals from both judgments of conviction have been brought under this general number.



With regard to indictment number 68-316 charging defendant with, inter alia, conspiracy to unlawfully sell a narcotic drug, Floyd Flemister, alias Albert Cross (hereinafter "informer"), testified that on March 30, 1967 he advised Chicago police officers Crosier and Kelly that he would be able to make a purchase of narcotics. At about 3:00 A.M. that day he was "strip searched" by the officers and given currency, the serial numbers of which were pre-recorded, to effect the purchase. The two officers and the informer then went by unmarked police vehicle to the corner of 47th Street and Prairie Avenue, where the informer and the officers alighted from the vehicle. The informer walked a short distance to a location near an elevated train structure where he met Edward Thigpen. The witness and Thigpen engaged in conversation, during which they agreed on the sale of a quantity of narcotics for a certain price, and the two men then walked a short distance to a well-lighted area under the elevated structure in front of an all-night restaurant where they met the defendant. The informer had known the defendant prior to the night in question. The informer testified that he removed the pre-recorded currency from his pocket, counted it and gave it to Thigpen, and that Thigpen gave the money to the defendant who in turn gave Thigpen a tinfoil packet which was about the size of a postage stamp. No words were exchanged between any of the men at this latter meeting. Thigpen and the informer then walked to 46th Street and South Park Boulevard, during which walk Thigpen continuously held the tinfoil packet in his "balled up" hand, and, upon arriving at that location, Thigpen gave the informer the same tinfoil packet which Thigpen had earlier received from the defendant. Thigpen and the informer then parted and the informer proceeded to the officers' nearby police vehicle where he turned the tinfoil packet over to the officers.

Officers Kelly and Crosier testified at trial in

substantially the same manner: After the informer had advised them that he could make a purchase of narcotics, at the time and on the date in question, he was "stip searched" and given pre-recorded funds. The informer was driven to 47th Street and Prairie Avenue by the officers; all three alighted from the vehicle; and, as the informer met Thigpen on one side of the street, the officers stationed themselves on the other side of the street about thirty or forty feet away. The informer and Thigpen then joined the defendant a short distance away in a well-lighted area in front of a restaurant; the officers were directly across the street from the three men. Thigpen counted out the money which the informer had given him, and the money was handed to defendant. The defendant took the money, the hands of Thigpen and the defendant also "met," and the defendant placed the money into his pocket. Although the officers testified to having observed the money passing between Thigpen and defendant and to having observed the hands of those two men otherwise "meet," they did not observe physical passing of the narcotics between Thigpen and the defendant. The officers then observed Thigpen and the informer walk away from the site, the officers followed in their police vehicle, and at the corner of 46th Street and South Park Boulevard, the officers observed the hands of the two men meet and the two men depart in different directions. The informer returned to the police vehicle and gave the tinfoil packet to the officers, and the packet was "field tested and found to be positive." The officers then returned to the site of the original meeting where they observed Thigpen join the defendant and the latter two men were placed under arrest as they proceeded from the scene. A subsequent search of the two men disclosed the pre-recorded currency on the person of the defendant.

Defendant offered no evidence in his own behalf. He was thereafter found guilty of conspiracy to unlawfully sell narcotics to the informer.

With regard to indictment number 68-2235, defendant entered a plea of guilty to the unlawful possession of 38 grams of heroin on December 1, 1967 while in an apartment which was entered by police pursuant to a search warrant. Defendant was thereafter sentenced as noted above.

Defendant initially contends that the evidence was not sufficient to sustain the conspiracy conviction, arguing that the alleged agreement between defendant and Thigpen to unlawfully sell a narcotic drug to the informer was not proven and that the informer was an incredible witness.

The pertinent provisions of the conspiracy statute, in effect at the time defendant was alleged to have committed that offense, read as follows (Ill. Rev. Stat. 1965, ch. 38, par. 8-2):

"(a) Elements of the offense. A person commits conspiracy when, with intent that an offense be committed, he agrees with another to the commission of that offense. No person may be convicted of conspiracy to commit an offense unless an act in furtherance of such agreement is alleged and proved to have been committed by him or by a co-conspirator.

"(b) Co-conspirators.

"It shall not be a defense to conspiracy that the person or persons with whom the accused is alleged to have conspired:

- (1) Has not been prosecuted or convicted, or
- (2) Has been convicted of a different offense, or
- (3) Is not amenable to justice, or
- (4) Has been acquitted, or
- (5) Lacked the capacity to commit an offense."

The clandestine nature of the offense of conspiracy renders generally impossible the production of witnesses to the conspiracy agreement; however, the acts of the co-conspirators may themselves establish the existence of that agreement by inference. People v. Graham, 1 Ill. App. 3d 749, 752, 274 N.E. 2d 370. The acts of the defendant and Thigpen, when viewed as a whole, reveal the existence of an agreement to unlawfully sell narcotics to the informer.

The record reveals that the informer advised the police that he would be able to purchase narcotics. Apparently without the direct and immediate knowledge and outside the presence of the defendant, Thigpen and the informer agreed upon the price and the amount of the drug to be purchased. Thigpen and the informer then joined the defendant, and, without a word being spoken, the money was counted out by Thigpen and given to defendant, in return for which the defendant gave Thigpen the amount of narcotics which had apparently been previously agreed upon between Thigpen and the informer. The narcotics were later given to the informer at a different location, and Thigpen re-joined defendant at the site of the original sale thereafter. The State produced evidence of the necessary concert of action to establish a conspiracy between the defendant and Thigpen to unlawfully sell a narcotic drug to the informer.

The questions raised as to whether a transfer of narcotics from the defendant to Thigpen was proven, whether the informer was a credible witness, and whether a finding on the conspiracy count was inconsistent with the lack of findings on the other two counts were matters for resolution by the trier of facts, under the instant circumstances.

The cases of People v. Gates, 29 Ill. 2d 586, 195 N.E. 2d 161, and People v. Walter, 23 Ill. App. 2d 129, 161 N.E. 2d 707, cited by defendant, are not applicable to the facts of this case.

Defendant also contends that the acquittal of Thigpen on the conspiracy charge requires an acquittal of defendant on the same charge. On the contrary, no evidence appears of record, nor dehors the record, which would indicate that Thigpen was in fact acquitted on the conspiracy charge. In the case of People v. Thigpen, 121 Ill. App. 2d 341, 257 N.E. 2d 493, it appears that a separate trial as to Thigpen was had on the instant sale of the narcotics to the informer. Thigpen was found guilty of the sale only (which we affirmed in the cited case), and that

opinion does not refer to a conspiracy charge.

Nevertheless, the conspiracy statute itself provides that the acquittal of a co-conspirator does not entitle an accused to an acquittal on that charge as well. Ill. Rev. Stat. 1965, ch. 38, par. 8-2(b).

The cases of People v. Bryant (1950), 342 Ill. App. 90, 95 N.E. 2d 620, affirmed (1951) 409 Ill. 467, 100 N.E. 2d 598 and People v. Nathanson (1945), 389 Ill. 311, 59 N.E. 2d 677, cited by defendant, stand solely for the general principles of law noted in the defendant's brief and are factually inapposite to the case at bar.

The final contention raised by defendant relates to whether he should have been convicted of the possession of a narcotic drug since he was an addict at the time he was found to be in possession, and whether he should be sentenced in accordance with the terms of the Unified Code of Corrections.

As to the first argument, it need only be said that defendant himself admits that the question of whether a narcotics addict may be found guilty of the possession of narcotics has been answered in this State in the affirmative. See People v. Jackson, 40 Ill. 2d 143, 238 N.E. 2d 383.

Relief under the second portion of his contention is obviated by the fact that defendant was found in possession of 38 grams of heroin, which, under the Controlled Substances Act and the Unified Code of Corrections, is a Class 1 felony (not punishable by death) for which the minimum term of imprisonment is four years and the maximum term any number of years in excess thereof. Ill. Rev. Stat. 1972 Supp., ch. 56-1/2, par. 1402(a) (1); ch. 38, par. 1005-8-1. Defendant was sentenced to a term of four years to ten years, to run concurrently with an identical term imposed on the conspiracy conviction, which was within the discretion of the trial judge, and a re-sentencing of the defendant would clearly serve no useful purpose.

For these reasons the judgments of the circuit court of Cook County are affirmed.

Judgments affirmed.

Second Division, Stamos, P.J., not participating.

14 I.A.³ 774



58215

PEOPLE OF THE STATE OF ILLINOIS,	)	APPEAL FROM THE
Plaintiff-Appellee,	)	CIRCUIT COURT OF
	)	COOK COUNTY
v.)	
)	
LAUREANO RAMOS, ANGELO COLON,	)	HONORABLE
RICKY MUNOZ and PAUL RAUL DAVILLA,	)	JOHN J. CROWLEY,
Defendants-Appellants.	)	JUDGE PRESIDING.

MR. JUSTICE DOWNING delivered the opinion of the court:

Defendants were found guilty after a bench trial of the offense of theft in violation of section 16-1(a)(1) of the Criminal Code (Ill.Rev.Stat. 1971, ch. 38, par. 16-1(a)(1)). They were each sentenced to a term of six months in the House of Correction. Defendants appeal, arguing that the complaints filed against defendants Ramos, Colon and Munoz were fatally defective and that the defendants Munoz and Davilla were not proven guilty beyond a reasonable doubt.

At trial, the following evidence was adduced: Antonio Alvarez testified that on July 22, 1972, at about 2:00 P.M. or 3:00 P.M., he was walking in the area of Chicago and Throop Streets, Chicago, Illinois. As he was walking down the street, he was approached by the four defendants. Defendant Munoz stopped Alvarez, showed him a book, stated he was collecting for something and asked for money. Defendant Colon produced a gun, grabbed Alvarez by the hand and pulled him over to the side. Colon told defendant Ramos to take his money and Ramos complied. During the incident, defendants Munoz and Davilla were standing on each side of Mr. Alvarez approximately one foot away.

Officer McQuiry, a Chicago police officer, testified that on July 22, 1972, he took a complaint of a robbery from Alvarez. On that date, Alvarez identified defendants Davilla

and Munoz. Subsequently, Alvarez identified defendants Colon and Ramos.

Paul Davilla, Ricky Munoz and Laureano Ramos, defendants, testified that on July 22, 1972, they were in the vicinity of Chicago and Throop Streets, Chicago, Illinois. At that time, Alvarez came up and asked them if anyone wanted to buy a gun. Alvarez and Colon then went into the alley for Alvarez to show Colon the gun. All three defendants denied robbing Alvarez.

Defendants' first argument is that the complaints filed against Colon and Ramos were fatally defective because they failed to allege the prerequisite mental state. Defendants urge that the failure to include the word "knowingly" in the complaint charging defendants with theft rendered the complaint fatally defective. The complaint filed against Ramos was:

[T]hat Laureano Ramos has, on or about 22 July 1972 at 736 N. Throop Chgo. Cook Co. committed the offense of Theft in that he did obtain unauthorized control over United States Currency being the property of Antonio Alvarez, of the value of less than \$150.00 and intended to deprive him permantely (sic) of the use and benefit of said property in violation of Chapter Section 16-1a1 ILLINOIS REVISED STATUTE.

The complaint filed against Colon was:

[T]hat Angelo Colon has, on or about 22 July 1972 at 736 N. Throop, Chicago, Cook Co., Ill. committed the offense of Theft in that he did obtain unauthorized control over United States Currency, the property of Antonio Alvarez, of the value of less than \$150.00 with the intent to deprive the said Antonio Alvarez permanently of the use and benefit of said property in violation of Chapter 38 Section 16-1a1, ILLINOIS REVISED STATUTE.

In People v. Wilson (1973), 10 Ill.App.3d 48, 294 N.E. 2d 1, this court rejected the exact contention that defendants Colon and Ramos now make. There a complaint almost identical to those in the case at bar was held to be sufficient. See also People v. Reese and Jones (1973), 11 Ill.App.3d 817, 298 N.E.2d 3.

Defendants next argue that the complaint filed against defendant Munoz is fatally defective because it alleges that he knowingly obtained "authorized" control of United States Currency intending to deprive the owner permanently of the use and benefit of said property. Defendants urge that since the complaint states that the control was authorized, it does not state an offense.

In People v. Parr (1970), 130 Ill.App.2d 212, 264 N.E. 2d 850, this court held that a complaint which charged that the defendant had committed certain acts "with legal justification" was valid and that the mere miswriting of the word "with" instead of "without" was a typographical or clerical oversight which did not invalidate the complaint or violate Parr's constitutional right to be apprised of the nature of the charge against him.

In the case at bar, the complaint filed against the defendant Munoz was sufficient to apprise him of the crime charged and to enable him to prepare his defense. The typographical error in the complaint where the word "authorized" was used instead of the word "unauthorized" is a formal defect which does not render the complaint insufficient. The purely formal nature of the defect and the adequacy of the complaint to apprise Munoz of the crime charged are apparent from the phrase "intending to permanently deprive the owner Antonio Alvarez of the use and benefit of the property, in violation of Chapter 38 Section 16-1a1, ILLINOIS REVISED STATUTE * * *."

We believe that the complaints as filed against defendants Colon, Ramos and Munoz, although each containing some imperfection as to form, sufficiently comply with the requirements of the statutory mandate of the Criminal Code as

to the form of charge (Ill.Rev.Stat. 1971, ch. 38, par. 111-3 (a)).¹ We also believe each defendant is protected from any subsequent prosecution for the same offense. People v. Bauta (1970), 124 Ill.App.2d 132, 260 N.E.2d 306; People v. Flippo (1972), 7 Ill.App.3d 625, 287 N.E.2d 733. The case of People v. Stewart (1971), 3 Ill.App.3d 699, 279 N.E.2d 113, relied upon by defendants, involved a defect of an indictment which concerned the question of whether a crime was in fact charged. As set forth in this opinion, the instant complaints do charge each defendant with the commission of a crime.

Defendants' final contention is that Munoz and Davilla were not proven guilty beyond a reasonable doubt because the evidence was not sufficient to establish that they were accountable for the actions of their co-defendants. Section 5-2 of the Criminal Code (Ill.Rev.Stat. 1971, ch. 38, par. 5-2) provides that a person is legally accountable for the conduct of another when:

(c) Either before or during the commission of an offense, and with the intent to promote or facilitate such commission, he solicits, aids, abets, agrees or attempts to aid, such other person in the planning or commission of the offense.

In People v. Washington (1962), 26 Ill.2d 207, 186 N.E.2d 259, the Supreme Court, in applying this section, stated at page 209:

While it is true that mere presence or negative acquiescence is not enough to constitute a person a principal, one may aid and abet without actively participating in the overt act and if the proof shows that a person was present at the commission of the crime without disapproving or opposing it, it is competent for the trier of fact to consider this conduct

1/ (a) A charge shall be in writing and allege the commission of an offense by:

- (1) Stating the name of the offense;
- (2) Citing the statutory provision alleged to have been violated;
- (3) Setting forth the nature and elements of the offense charged;
- (4) Stating the date and county of the offense as definitely as can be done; and
- (5) Stating the name of the accused, if known, and if not known, designate the accused by any name or description by which he can be identified with reasonable certainty.

in connection with other circumstances and thereby reach a conclusion that such person assented to the commission of the crime, lent to it his countenance and approval and was thereby aiding and abetting the crime. (citations omitted) Stated differently, circumstances may show there is a common design to do an unlawful act to which all assent, and whatever is done in furtherance of the design is the act of all, making each person guilty of the crime. (citations omitted)

In the case at bar, all four defendants approached Alvarez together. Munoz stopped Alvarez, showed him a book and stated he was collecting for something. Colon produced a gun and pushed Alvarez over to the side where, upon Colon's instructions, Ramos took Alvarez's money. During this time, Munoz and Davilla stood approximately one foot from Alvarez on each side, thereby preventing his escape. Munoz and Davilla did not at any time disapprove or oppose the actions of their co-defendants. From the totality of these circumstances, the trier of fact could reasonably have found that the defendants were more than just innocent bystanders and that they had lent approval to the robbery by aiding and abetting its commission. People v. Brown (1973), 10 Ill.App.3d 556, 294 N.E.2d 722; People v. Bleimehl (1972), 9 Ill.App.3d 273, 292 N.E.2d 60. The evidence is sufficient to sustain the convictions of Munoz and Davilla beyond a reasonable doubt.

For the foregoing reasons, the judgment of the circuit court of Cook County is affirmed.

JUDGMENT AFFIRMED.

STAMOS, P.J., and HAYES, J., concur.

(Abstract Only)

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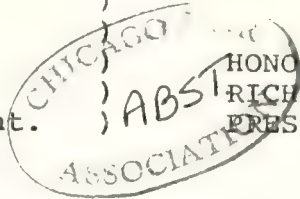
PEOPLE OF THE STATE OF ILLINOIS,)

Plaintiff-Appellee,)

vs.)

JULIO MARTINEZ,)

Defendant-Appellant.)

APPEAL FROM THE
CIRCUIT COURT
OF COOK COUNTY.HONORABLE
RICHARD J. FITZGERALD,
PRESIDING.

PER CURIAM:*

Defendant, Julio Martinez, appeals the denial of his motion, brought under section 72 of the Civil Practice Act, to set aside his earlier conviction of three violations of Ill. Rev. Stat. 1967, ch. 38, par. 22-3. Since resolution of the issue depends upon an understanding of the sequence of events in the court below, a chronological review of the essential points in the record is set out:

October 21, 1968: Defendant entered his plea of guilty to three indictments (charging conspiracy to sell a narcotic drug, unlawful sale of a narcotic drug, and unlawful possession of a narcotic drug, all in violation of Ill. Rev. Stat. 1967, ch. 38, par. 22-3), and was sentenced to terms of three to five years, five to nine years, and five to nine years, respectively, in the Illinois State Penitentiary, all three sentences to run concurrently. There was no appeal from these convictions and sentences.

April 16, 1970: At a hearing under the Post-Conviction Hearing Act, defendant's original trial attorney testified that defendant had been told by the said attorney that defendant would "get concurrent time" if his probation on two unrelated indictments before Judge Nathan M. Cohen was revoked. This post-conviction petition, dealing with, *inter alia*, whether defendant should have been provided an interpreter because he could not

"understand English", was dismissed on motion of the State; there was no appeal.

September 28, 1970: Defendant filed this action, before Judge Richard J. Fitzgerald, under section 72 of the Civil Practice Act to set aside the October 21, 1968, judgments of conviction on the ground that the pleas of guilty had been induced by the statement of defendant's attorney that defendant would "get concurrent time" if his probation on two unrelated indictments was revoked by Judge Cohen when in fact no such understanding or even communication relative to such a matter had in fact been had with Judge Cohen.

October 20, 1970: Judge Fitzgerald denied the section 72 motion on the ground that the petitioner "hadn't been hurt yet" since he had not yet been sentenced by Judge Cohen on the probation revocation matter; defendant then brought this appeal.

The record does not show what action, if any, Judge Cohen subsequently took with regard to the probation revocation matter pending before him.

"Petitions under section 72, while available in criminal as well as civil cases, have the limited function of bringing to the attention of the court errors of fact of such character as would have prevented rendition of the judgment." People v. Stevens (1970), 127 Ill.App.2d 415, 419, 262 N.E.2d 286.

The State argues that the use of section 72 was improper because the judgment in the post-conviction matter became final after 30 days had passed from April 16, 1970, and that defendant, therefore, has waived the issue sought to be raised by petition under section 72, citing People v. Stevens, supra.

The petition before us was timely filed and contained allegations of fact which were unknown to the trial judge without negligence on the part of the defendant. The trial judge recognized

that fundamental fairness required that defendant be granted relief if his factual claim was true as he so stated, but he felt the request for relief was premature because defendant hadn't "been hurt yet". We note that, had the facts contained in the section 72 petition been filed as a subsequent amendment to the post-conviction petition, the amendment would have had to be allowed under the doctrine that the waiver rule normally applicable to subsequent amendments of a post-conviction petition will not be applied where its application will result in fundamental unfairness to the defendant. People v. Nichols (1972), 51 Ill.2d 244, 281 N.E.2d 873. We hold that under the circumstances here, a petition under section 72 of the Civil Practice Act was an appropriate vehicle for relief.

For purposes of section 72, a plea of guilty in a criminal case may be compared to a consent decree which, likewise, may be reached by a petition under section 72. We said recently in City of Des Plaines v. Scientific Machinery Mov., Inc. (1973), 9 Ill.App.3d 438, 443-444, 292 N.E.2d 154, 157-158:

"Before the enactment of this provision, consent decrees could be collaterally attacked only through bills of review and were specifically immune from challenges by appeal or writ of error. (Sims v. Powell, 390 Ill. 610, 62 N.E.2d 456). Thus, consent decrees could previously be vacated only upon a showing of (1) errors of law apparent on the face of the record, (2) newly discovered evidence, or (3) fraud in the procurement of the decree. (See Smith-Hurd Annotated, ch. 110, §72, Joint Committee Comments). With the enactment of Section 72, however, timely challenges to consent decrees must be judged by the broad equitable considerations which govern all Section 72 petitions. (Eliman v. DeRuiter, 412 Ill. 285, 106 N.E.2d 350; People ex rel. Forbrich v. Forbrich, 113 Ill.App. 2d 249, 252 N.E.2d 21). The standard to be applied is well stated in Park Avenue Lumber & Supply Co. v. Hofverberg, 76 Ill.App. 2d 334, 222 N.E.2d 49:

'The liberal construction of Section 72 was reaffirmed in Elfman v. Evanston Bus Co., 27 Ill.2d 609, 190 N.E.2d 348, and the policy enunciated by the court there clearly establishes



that the courts are not strictly bound by precedent in affording post-judgment relief, but rather may exercise their equitable powers to grant relief where necessary to prevent injustice. Whether or not the litigant is entitled to relief under Section 72 depends on all the circumstances attendant on the entry of the default judgment. Many different factual situations would justify or, indeed, necessitate the vacation of a decree or portion thereof.' 76 Ill.App.2d 334, 347-48. (Emphasis added.)."

A petition under section 72 is addressed to the equitable powers of the court as justice and fairness require. Elfman v. Evanston Bus Co. (1963), 27 Ill.2d 609, 190 N.E.2d 348. Justice, we think, will best be served, under the facts herein, if the following steps are taken: (1) The hearing on the section 72 motion should be reopened so the court can hear evidence of what disposition Judge Cohen made of the probation revocation matter pending before him and the reasons, if stated, for Judge Cohen's actions; (2) the court should permit amendment of the section 72 petition to conform it to the additional proofs; and (3) the trial court should make such disposition of the amended section 72 petition as shall, under all the circumstances, seem just and equitable to it.

The judgment of the circuit court of Cook County is reversed and the cause is remanded for a new hearing consistent with the views expressed herein.

REVERSED AND REMANDED.

* FIRST DISTRICT, SECOND DIVISION
LEIGHTON, J., did not participate.

57614

PEOPLE OF THE STATE OF ILLINOIS,

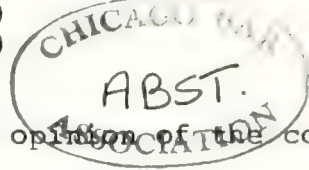
Plaintiff-Appellee,

vs.

DeELVIN CHATMAN,

Defendant-Appellant.

)
)
) APPEAL FROM THE
) CIRCUIT COURT OF
) COOK COUNTY
)
) HON. JOSEPH A. POWER,
) JUDGE PRESIDING.



MR. PRESIDING JUSTICE BURMAN delivered the opinion of the court.

DeElvin Chatman, the defendant, was charged by an indictment with burglary. On March 10, 1971, he pleaded guilty and was sentenced to three years probation. While this probation was in effect he was found guilty of armed robbery and sentenced to not less than two nor more than four years in the penitentiary. As a result of this the court on February 9, 1972, revoked his probation and sentenced him to not less than three nor more than ten years in the penitentiary, the sentence to run consecutively to that imposed on the armed robbery charge. This appeal followed.

The sole issue on appeal is whether the sentence imposed by the court after it revoked the defendant's probation is excessive. The defendant contends that in setting the sentence the court (1) considered acts which occurred subsequent to the time that it placed him on probation, (2) was influenced by its displeasure with him and (3), imposed a punishment that was disproportionate to the crime committed.

We direct our attention first to the contention that the court erred by considering events subsequent to the offense for which the defendant was sentenced. This stems from the following comments, made during the probation revocation hearing:



THE COURT: It seems somewhat unusual when I accepted -- My vague recollection of it when I granted probation was that the defendant indicated to me that he was going to reside in another state, to live elsewhere. He wouldn't be able to bother any of the citizens in Illinois any way when he was going to live in Colorado. He was all set then to go out to Colorado. But then I see here the next day he was arrested in a stolen vehicle. Maybe he was trying to get to Colorado in that.

MR. LEIBOWITZ: Your Honor, that matter is currently under appeal.

THE COURT: And then even March 11th. Then later than that he was found with a sawed-off shotgun and committed a robbery. So he has never made it to Colorado.

MR. LEIBOWITZ: Your Honor --

THE COURT: So he must have been lying when he told me that.

MR. BRICE: Your Honor, I believe the defendant also told Your Honor he had plane tickets for that afternoon leaving for Colorado, and his wife and five children, I believe it was, they purchased a home out there.

THE COURT: What do you have to say in mitigation?

The defendant argues that these comments indicate that the court considered the subsequent auto theft and armed robbery charges when it sentenced him on the original burglary conviction. After reviewing the record in its entirety we disagree.

The sentence imposed was well within the statutory limits and therefore was proper. (Ill.Rev.Stat.1969, ch.38, par.19-1.) The court was entitled to recall the representations made by the defendant at the time of the original sentencing and to comment that they were apparently false. That it did so does not in and of itself raise an inference that it considered anything other than the circumstances of the original burglary in setting the sentence. As stated in People v. Harden, 6 Ill.App.3d 172:

Upon revocation of a probation the defendant should be sentenced for the original crime for which he had been convicted and not for any delinquency which caused revocation of probation.*** Nevertheless, the trial court cannot close its eyes to defendant's actions while on probation and causing the court to lose confidence in defendant's rehabilitation possibility.

6 Ill.App.3d at 177.

The defendant relies primarily upon People v. Danno, 132 Ill.App.2d 558. In Danno the defendant was convicted of forgery and sentenced to five years probation. As a condition of his probation he was required to restore the sums illegally obtained. This condition was satisfied. Subsequently he committed another offense, and his probation was revoked. At the revocation hearing the prosecutor recommended a sentence of from two to five years in the penitentiary and the defendant's counsel recommended a sentence of from one to three years. The court imposed a sentence of not less than three nor more than fourteen years in the penitentiary. The Appellate Court modified this sentence to that originally suggested by the State on the theory that the harshness of the sentence imposed by the trial court raised doubt as to whether it had considered only the original offense in imposing it.

In our view the court's decision in Danno is based upon the circumstances of that case, particularly the fact that the defendant had made a full restitution of the money which he il-

legally obtained. Therefore Danno is of little value in deciding the present case. As we have indicated above we believe that the circumstances of the present case, as presented in the record, are different from those in Danno and reveal no abuse of the trial court's discretion. The defendant's first contention is without merit.

The defendant's second contention is that the trial court was influenced by its displeasure with him in imposing a harsh sentence. This stems from the same comments which we have set forth above. Our discussion of the first contention applies here as well. Nothing in the record indicates that the trial court acted improperly. The second contention is without merit.

The defendant's third contention is that the court imposed a sentence disproportionate to the crime committed. This stems from the court's decision that the sentence that it imposed on the burglary conviction should run consecutively to that imposed in the armed robbery case. It is well settled that the imposition of a consecutive, rather than a concurrent, sentence is within the sound discretion of the court. (People v. May, 132 Ill.App.2d 766.) Nothing in the present case indicates that the trial court abused this discretion.

For the foregoing reasons the judgment of the Circuit Court of Cook County is affirmed.

AFFIRMED.

ADESKO AND JOHNSON, JJ.,

CONCUR.

(Abstract only)

No. 58188

PEOPLE OF THE STATE OF ILLINOIS
EX REL. MAJOR WHITE,

Relator-Appellant,

vs.

ELZA BRANTLEY, WARDEN, ILLINOIS
STATE PENITENTIARY, MENARD,
ILLINOIS,

Respondent-Appellee.)

) APPEAL FROM THE
) CIRCUIT COURT OF
) COOK COUNTY

ABST

) HONORABLE
) JOSEPH A. POWER
) PRESIDING

PER CURIAM* (First District, Fifth Division):

Petitioner, Major White, appeals the dismissal of his pro se petition for a writ of habeas corpus contending that he was denied the effective assistance of counsel in the proceedings on his petition.

Petitioner was convicted of possession and sale of narcotics and sentenced to a term of 10 to 12 years. His petition for a writ of habeas corpus alleged that the sentence of 10 to 12 years was illegal because it was not sufficiently indeterminate. The public defender of Cook County was appointed to represent him and, subsequently, upon motion of the respondent, the petition was dismissed. In support of his contention of inadequate representation, he alleges that the record does not indicate that his counsel communicated with him prior to the hearing or that he reviewed the record of his conviction or made any effort to amend the pro se petition.

He agrees that these alleged omissions were not required by the Illinois Habeas Corpus Act (Ill. Rev. Stat. 1971, ch. 65). He points out, however, that they were required under the Post-Conviction Hearing Act (Ill. Rev. Stat. 1972, ch. 38, par. 112), People v. Slaughter, 39 Ill.2d 278, 235 N.E.2d 566, and that Rule 17.2 of the circuit court of Cook County provides for appointed counsel on habeas corpus petitions filed by persons without funds. He reasons that because of the similarity between habeas corpus and post-conviction petitions in that they both seek relief from

*Judge Lorenz did not participate.

some type of confinement or custody, the need for effective legal assistance is just as great in one as the other.

Respondent contends petitioner was adequately represented on his petition, and that the petition cannot be interpreted as one for a post-conviction hearing because it does not raise a question of the denial of a constitutional right.

OPINION

In Slaughter, it was held that the Post-Conviction Hearing Act contemplated that appointed counsel would consult with a petitioner, ascertain his grievance, examine the trial proceedings and then amend the petition so that it would adequately present his constitutional contentions. The court also noted that the Illinois Habeas Corpus Act provides for a writ only where the trial court lacked jurisdiction or where something has occurred since the original judgment which would entitle the prisoner to a release. People ex rel. Jefferson v. Brantley, 44 Ill.2d 31, 253 N.E.2d 378. Moreover, it is well established that the remedy of habeas corpus is not available to review errors of a non-jurisdictional nature, even though that may involve a claim of denial of constitutional rights. People ex rel. Lewis v. Frye, 42 Ill.2d 58, 245 N.E.2d 483; People ex rel. Skinner v. Randolph, 35 Ill.2d 589, 221 N.E.2d 279.

Here, petitioner alleged a non-jurisdictional ground, i.e., his sentence of 10 to 12 years was not indeterminate and there was no showing of anything that had occurred since the judgment which would entitle him to a release. For the reasons stated, we believe that the purpose or terms of the Habeas Corpus Act do not justify an extension of the doctrine pronounced in Slaughter.

It is also our belief that the allegations in the pro se petition would not entitle petitioner to relief under the Post-Conviction Hearing Act. In People v. Shaw, 49 Ill.2d 309, 273 N.E.2d 816, the defendant argued that his sentence of three years

to three years and one day was not an indeterminate sentence. In affirming the trial court's action dismissing the petition without an evidentiary hearing, the Supreme Court held that this allegation failed to raise any constitutional issue under the Post-Conviction Hearing Act.

In the case of People ex rel. Palmer v. Twomey, 53 Ill.2d 479, 292 N.E.2d 379, defendant appealed the dismissal of his pro se petition for a writ of habeas corpus. There the Supreme Court noted that the same lack of legal knowledge which may cause a prisoner to draft an inadequate post-conviction petition may also result in his selecting the wrong remedy to collaterally attack his conviction. The court held that consistent with the intent of the Post-Conviction Hearing Act, as expressed in Slaughter, a salutary result would be achieved if the trial court, upon finding that a pro se petition, however labeled and however inartfully drawn, alleged violations of a petitioner's rights, which were cognizable in post-conviction proceedings, would thereafter for all purposes treat the petition as a post-conviction petition. In the case at bar, petitioner's allegations do not demonstrate a deprivation of any constitutional rights recognizable under the Post-Conviction Hearing Act. People v. Shaw, 49 Ill.2d 309, 273 N.E.2d 816. Therefore, the trial court did not err in failing to treat petitioner's pro se petition as a petition under the Illinois Post-Conviction Hearing Act.

In People v. Cobb, 8 Ill.App.3d 1081, 290 N.E.2d 610, the Illinois Appellate Court for the Second District, in dealing with a similar problem, held that a defendant who had filed a habeas corpus petition which was clearly defective and properly stricken was not barred from filing a subsequent post-conviction petition if there were any constitutional grounds to support such a petition.

For the reasons stated, we conclude the trial court was correct in dismissing the petition for a writ of habeas corpus and its judgment is affirmed.

JUDGMENT AFFIRMED.

Abstract Only.

56593)
57748)



PEOPLE OF THE STATE OF	)	APPEAL FROM
ILLINOIS,)	
Plaintiff-Appellee,	)	CIRCUIT COURT,
)	
vs.	)	COOK COUNTY.
)	
JIMMY BOWEN,	)	HON. KENNETH E. WILSON,
Defendant-Appellant.)		Presiding.

*PER CURIAM (FIRST DIVISION, FIRST DISTRICT):

Jimmy Bowen, hereafter called defendant, was originally charged by indictment with the crime of murder in violation of section 9-1 of the Criminal Code (Ill.Rev.Stat. 1969, ch. 38, par. 9-1). After a jury trial had been commenced and four jurors chosen, defendant on March 29, 1971 withdrew his previously entered plea of not guilty and entered a plea of guilty to the lesser included offense of voluntary manslaughter. Defendant was sentenced to a term of four to ten years. Defendant appeals that conviction.

On June 16, 1971, defendant filed a pro se petition for writ of habeas corpus alleging that he was denied his right to counsel and that his detention was illegal since he was not given a copy of the complaint until September 18, 1970, 48 days after his arrest, at which time he was given a copy of the indictment charging him with murder. On July 14, 1971, and April 19, 1972, hearings were held on defendant's pro se petition, after which the State's motion to dismiss was granted. Defendant also appeals that dismissal. Both cases have been consolidated in this court.

The public defender of Cook County was appointed to represent defendant on appeal. Subsequently the public defender withdrew as counsel and private counsel was appointed to represent defendant on appeal. Private counsel has now filed a motion for

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leave to withdraw accompanied by a brief in support thereof, pursuant to Anders v. California, 386 U.S. 738. The brief states, in effect, that an appeal in this case would be wholly frivolous and without merit. Copies of the motion and brief were mailed to defendant on May 11, 1973. Defendant was advised that he had until June 27, 1973, to file any additional points he might choose in support of his appeal. Defendant has responded.

The petition and brief of appointed counsel allege that the only possible issues which could be raised on appeal would be whether defendant's plea of guilty was intelligently and voluntarily made and whether defendant's pro se petition for writ of habeas corpus was properly denied.

Illinois Supreme Court Rule 402 (Ill.Rev.Stat. 1971, ch.110A, par. 402) sets forth the requirements which must be substantially complied with by the trial judge in accepting a plea of guilty. In the case at bar, prior to accepting the plea of guilty, the trial judge gave the defendant an explanation of the charge against him, informed the defendant of the minimum and maximum possible penalties, informed the defendant that he had a right to plead not guilty and had a right to plead guilty, and informed the defendant that by pleading guilty he waived his right to a jury trial and his right to be confronted by the witnesses against him. The trial judge determined in open court that there had been a pre-trial conference and stated the terms that were agreed to at the conference in defendant's presence. Defendant stated that he understood those terms and still wished to enter a plea of guilty. After determining that there was a factual basis for the plea and after a hearing in aggravation and mitigation was held, defendant was sentenced in accordance with the terms agreed to at the pre-trial conference. The admonishments by the trial judge were

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sufficient to comply with Supreme Court Rule 402. Defendant's plea of guilty was intelligently and voluntarily made.

Defendant's pro se petition for writ of habeas corpus alleged that he was denied his right to counsel, and that his detention was illegal since he was not given a copy of the complaint until September 18, 1970, 48 days after his incarceration, at which time he was given a copy of the indictment charging him with murder. The rule has often been stated that a court has jurisdiction in habeas corpus proceedings only where the original judgment of conviction was void or where something has happened since its rendition to entitle a prisoner to relief. People ex rel. Skinner v. Randolph, 35 Ill.2d 589, 221 N.E.2d 279; People ex rel. Jefferson v. Brantley, 44 Ill.2d 31, 253 N.E.2d 378. In the case at bar, defendant's claims that he was denied his right to counsel and that he was not given a copy of the complaint charging him with murder would not render the original judgment of conviction void and defendant has not raised any matters which have occurred since the rendition of that judgment which would entitle him to relief. The trial court acted properly in sustaining the State's motion to dismiss defendant's petition for writ of habeas corpus.

We have also noted that the transcript of the hearing held on September 10, 1970 directly contradicts defendant's assertion that he was not given a copy of the complaint. On that date the trial judge specifically stated that the clerk had just handed defendant a copy of the complaint charging him with murder.

In his response in this court and in previously filed pro se briefs defendant raises several issues. He argues 1) that his detention was illegal and that he was not given a copy of the complaint charging him with murder until 48 days after his arrest, at which

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57748) .

time he was given a copy of the indictment charging murder; 2) that it was fatal error to deny him counsel at the preliminary hearing; 3) that it was error to deny his motion for substitution of judges; 4) that it was error to deny his motion to suppress evidence and identification; and 5) that he was denied due process and equal protection. Each of these allegations relates to matters of a non-jurisdictional nature. It is well established that a voluntary plea of guilty waives all non-jurisdictional matters. People v. Phelps, 51 Ill.2d 35, 280 N.E.2d 203. Similarly, errors of a non-jurisdictional nature cannot properly be raised in habeas corpus proceedings. People ex rel. Jefferson v. Brantley, 44 Ill. 2d 31, 253 N.E.2d 378.

In a supplemental memorandum, appointed counsel has argued that defendant's sentence should be reduced in conformity with the Unified Code of Corrections. Defendant was convicted of voluntary manslaughter which is a Class 2 felony (Ill.Rev.Stat., 1972 supp., ch. 38, par. 9-2). The Code provides that for a Class 2 felony, the maximum term shall be any term in excess of one year not exceeding 20 years (Ill.Rev.Stat. 1972 supp., ch.38, par. 1005-8-1(b)(3)) and the minimum term shall not be greater than one-third of the maximum term set by the court (Ill.Rev.Stat. 1972 supp., ch. 38, par. 1005-8-1(c)(3)). In the case at bar, defendant's minimum sentence is greater than one-third of the maximum. The minimum sentence must therefore be reduced to a term of three years and four months.

We have examined the record and concur in the opinion of appointed counsel that other than defendant's sentence, none of the arguments thus raised has substantial merit. Our inspection of the record does not disclose any additional possible grounds for an appeal which are also not frivolous.

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For the foregoing reasons, the motion of appointed counsel to withdraw as appellate counsel is allowed as to cases numbered 56593 and 57748. The judgment of the Circuit Court of Cook County in case number 57748 is affirmed and the judgment in case number 56593 is modified to show defendant's minimum sentence is reduced to a term of three years and four months, and as modified, that judgment is affirmed.

MOTION ALLOWED; JUDGMENT IN
57748 AFFIRMED; JUDGMENT IN
56593 AFFIRMED AS MODIFIED.

*HALLETT, J., took no part.

57164

SONDRA KRAY, JEFFREY KRAY, a minor	)	APPEAL FROM
by SONDRA KRAY, his mother and next)	
friend; RITA BOROFISKY and MARK	)	CIRCUIT COURT,
BOROFISKY, a minor, by RITA BOROFISKY,)	
his mother and next friend,	)	COOK COUNTY.
Plaintiffs-Appellants,)	
vs.)	
	)	HON. JAMES D. CROSSON,
MICK R. RICCI,	)	Presiding.
Defendant-Appellee.)	

MR. PRESIDING JUSTICE BURKE delivered the opinion of the court:

This is an appeal from a judgment in a personal injury action arising out of a collision between two vehicles, one occupied as passengers by the plaintiffs and the other driven by the defendant. The jury rendered a verdict in favor of the defendant. The plaintiffs appeal on the grounds that the defendant was guilty of negligence as a matter of law, that the plaintiffs should have been found free of contributory negligence as a matter of law, and that the court erred in instructing the jury on the applicable law.

At approximately 9:00 P.M. on December 26, 1966, a car driven by the defendant northbound on Skokie Highway collided with a car driven by Lila Preston in the intersection of Skokie Highway and Main Street. She was turning left from the southbound lanes of Skokie to proceed eastbound on Main Street. The plaintiffs were passengers in the Preston car. Lila Preston is not a party to this appeal, although she was both a plaintiff and a defendant in the lower court. She was dismissed as a co-defendant after effecting a settlement with the plaintiffs, and she does not appeal from the judgment in the defendant's favor.

Skokie Highway is a north-south street, which allows for four lanes of moving traffic and two curb lanes of parked cars up to a half block before the intersection with Main Street. At the intersection each curb lane is open to moving traffic. There are

thus three lanes going northbound and three southbound at the intersection. Main Street is four lanes wide, but at the intersection with Skokie Highway there are left turn lanes for traffic turning onto Skokie Highway. Traffic lights regulate the flow of cars through the intersection. The posted speed limit on Skokie Highway was 40 miles per hour at the time of the accident. We shall designate the lanes of traffic as follows: the curb lane is the outer lane, the next lane is the middle lane and the lane nearest the middle of the street is the inner lane.

It is undisputed that the Preston car was following other cars turning left onto Main Street eastbound and that its headlights and left turn signal were lighted at the time of the accident. It was a clear, dry night and the intersection was well-lighted. Traffic was light and there were cars southbound on Skokie Highway. There were several cars lined up in the inner lane northbound on Skokie Highway, waiting to proceed left, westbound on Main Street. There was approximately thirty feet from the front of the first of these cars to the north side of the intersection in which there were no northbound cars. The light was green for traffic north and southbound on Skokie Highway. The front of the defendant's car struck the Preston car in the right center to right rear while the Preston car was proceeding eastbound completing the left turn onto Main. The defendant was in the middle lane at impact. The Preston car was a Corvair, its length shorter than the standard size American car. The defendant did not see the Preston car until it was five feet in front of him. His car's regular headlights were on. He did not sound his horn or brake. There were no northbound cars directly in front of him immediately prior to the accident, and there was nothing to obstruct his vision straight ahead. The defendant's car came to rest

approximately twenty-five feet north of the center of Main Street. The Preston car came to rest on the parkway at the northeast corner of the intersection.

The defendant testified that his speed as he approached the intersection was 30-35 miles per hour, but he lifted his foot from the gas pedal as he neared Main Street, thus reducing his speed to 20-25 miles per hour. He stated that there was no reason prior to his sight of the Preston car five feet in front of him for him to sound his horn or brake to a stop. He also said that his car did not swerve from one lane to another within 100 feet of the intersection. He was about four feet to the right of the cars turning left to go westbound on Main as he passed them to proceed through the intersection. He had first seen these cars approximately 150 feet before he reached the intersection. He said his vision to the left was obstructed by these left-turning cars. He had no reason to turn at Main Street as his destination required him to continue past Main on Skokie Highway. He remained in the middle lane of traffic, and he said the impact occurred about five feet north of the center of Main Street.

The investigating police officer testified that the defendant told him he was traveling in the outer lane of traffic prior to the collision. He also testified that he arrived at the accident scene approximately five minutes after the incident occurred. The defendant's vehicle was in the middle lane approximately a car length north of the center line of Main Street, facing slightly northeast. The Preston car was on the parkway of the northeast corner of the intersection facing southeast. Debris on the street was located in the northeast quadrant of the intersection, in the middle northbound lane of Skokie Highway about eight to ten feet

north of the center line of Main Street. The officer said that Mrs. Preston told him at the hospital that the first vehicle turning westbound on Main from the northbound lanes of Skokie Highway had its bright lights on, but she proceeded with her turn. She told the officer, according to his testimony, that she never saw the defendant's car. On cross-examination the officer stated that he did not put his conversation with Mrs. Preston in his official report. He further testified that the point of impact of the two cars was in the northeast quadrant of the intersection, approximately 8-10 feet north of the center line of Main Street.

Mrs. Preston testified that she stopped her car two times before proceeding to complete her turn. Each stop was for a period of seconds, and the second stop was after she had crossed the imaginary center line of Main Street. She testified that she had a clear view of the northbound lanes of Skokie Highway and of the defendant's car as it approached. She also testified that she started to cross the inner northbound lane when the defendant's car was a half block away and that her car had reached the pedestrian crosswalk on Main parallel to Skokie Highway when the impact occurred. She thought the defendant swerved from the inner to the middle lane of traffic at about 150 feet from the intersection and that he was going very fast, 45-50 miles per hour. She said the accident occurred in the eastbound lanes of Main Street. Mrs. Preston denied making a statement to the officer at the hospital. She testified that she had picked up the plaintiffs to take them to bowling as she did each Monday. After bowling on the night of the accident, they were to have had a Christmas party at the bowling alley. A case of champagne for the party was in the left rear seat of her car. The bowling, though scheduled to start at 9:15 P.M., rarely started before 9:30. She testified that she had

plenty of time to travel to the bowling alley and arrive on time when the accident occurred. She said she screamed just prior to impact: "Good God, he is going to hit us. His lights are blinding."

Sondra Kray, who was sitting to the right of her son in the right rear seat, testified that Mrs. Preston picked her and her son up about 9:00 P.M. As Mrs. Preston was about to turn onto Main Street from the middle of the intersection, Mrs. Kray heard her say that she could not see, that the lights were blinding. She remembered nothing after that. She testified that Mrs. Preston was not speeding before the accident. On cross-examination she testified that Mrs. Preston was a little late, maybe fifteen minutes, in picking her up. She thought Mrs. Preston apologized for being late. Mrs. Kray was usually picked up around 8:30 or 8:40. She stated that Mrs. Preston slowed down after doing the speed limit, but she could not remember if she stopped prior to turning onto Main. She testified that Mrs. Preston did not cross the center line of Main before beginning her turn; she cut the turn short. As far as she could tell, the accident occurred just over the center line of Main, the Preston car being partially over that center line. Prior to the collision, she observed northbound traffic on Skokie Highway. She thought Mrs. Preston was a little more than halfway through her turn at impact.

Rita Borofsky, who was sitting in the right front passenger seat, had no recollection of the accident or of the events which preceded it. Her son, Mark, who was sitting with Mrs. Kray's son to the latter's left in the center of the rear seat, did not see the accident.

Mrs. Kray's son Jeffrey did not see the impact, but saw the car approaching them about 5-10 seconds before the crash. He said

the defendant's car swerved from the inner lane northbound to the middle lane and came at a fast speed toward the Preston car. He remembered the Preston car slowing down at the intersection, but he did not remember it stopping. The Preston car was halfway through the turn when the crash occurred. He remembered Mrs. Preston saying just prior to the impact that she could not see. He was sure he saw one northbound car waiting to turn westbound on Main.

The plaintiffs' first argument is that the defendant was guilty of negligence as a matter of law, because he should have seen the Preston car had he been keeping a proper look-out. The standard for finding negligence as a matter of law has been set out:

"Whether a given course of conduct amounts in law to negligence depends upon its character and attending circumstances. If the acts or the omissions complained of so contravene the promptings of ordinary caution that reasonable minds without doubt or hesitation would agree that no careful person would be guilty of the same, then such conduct is per se negligence.[citation]" (Crowe Name Plate & Mfg. Co. v. Dammerich, 279 Ill.App. 103, 107.)

As to the particular point raised by the plaintiffs, the law deems a party negligent in certain cases for not seeing something that he should have seen:

"It is well settled that one may not look with an unseeing eye and be absolved of the charge of negligence by asserting that he maintained a continuous lookout, yet failed to see that which he clearly should have seen.[citations]" (Payne v. Kingsley, 59 Ill.App.2d 245, 250, 207 N.E.2d 177, 179.)

Applying these rules of law, we do not find in this case that reasonable minds could not differ as to whether the defendant should have seen the Preston car. The question is basically whether it was physically possible to see the car. (See Larson v. Boudart, 104 Ill.App.2d 227, 244 N.E.2d 364.) There was evidence that the defendant's view to his left, from which point the

Preston car came, was obstructed. There is evidence of his caution in approaching the intersection with the traffic light in his favor. The question was properly left to the jury.

The next argument raised by the plaintiffs is that they should have been found free of contributory negligence as a matter of law. In Illinois it is the obligation of the plaintiffs to plead and prove their exercise of ordinary care and freedom from contributory negligence to recover in a negligence action. The question of contributory negligence is generally one for the jury. (Green v. Brown, 8 Ill.App.3d 638, 291 N.E.2d 18.) In this case there was sufficient evidence to present the issue to the jury. None of the plaintiffs could say that Mrs. Preston stopped her car before proceeding through the intersection. Mrs. Kray testified that Mrs. Preston cut her turn short of the middle of the intersection. There was testimony that Mrs. Preston announced she could not see because of the blinding lights. This evidence raises the question of whether the plaintiffs, in the exercise of ordinary care, should have attempted some kind of warning or admonishment of Mrs. Preston. The issue was therefore properly submitted to the jury.

The plaintiffs' final argument is that the jury was not properly instructed as to the law governing the case. The first instruction tendered by the plaintiffs was refused. The court found and the plaintiffs in this appeal agree that it eliminated the issue of contributory negligence of the plaintiffs. The instruction was properly refused.

The plaintiffs next contend that the giving of the three following instructions was error:

1)" There was in force in the State of Illinois at the time of

the occurrence in question a certain statute which provided, in part, as follows:

'Required Position and Method of Turning at Intersections.'

At any intersection where traffic is permitted to move in both directions on each roadway entering the intersection, an approach for a left turn shall be made in that portion of the right half of the roadway nearest the center line thereof and by passing to the right of such center line where it enters the intersection and after entering the intersection the left turn shall be made so as to leave the intersection to the right of the center line of the roadway being entered. Whenever practicable the left turn shall be made in that portion of the intersection to the left of the center of the intersection.'

If you decide that a party violated the statute on the occasion in question, then you may consider that fact together with all the other facts and circumstances in evidence in determining whether or not a party was contributorily negligent before and at the time of the occurrence."

2)"There was in force in the State of Illinois at the time of the occurrence in question a certain statute which provided that:

'Vehicle turning left. The driver of a vehicle intending to turn to the left within an intersection or into an alley, private road, or driveway shall yield the right-of-way to any vehicle approaching from the opposite direction which is so close as to constitute an immediate hazard, but said driver, having so yielded may proceed at such time as a safe interval occurs.'

If you decide that a party violated the statute on the occasion in question, then you may consider that fact together with all the other facts and circumstances in evidence in determining whether or not a party was contributorily negligent before and at the time of the occurrence."

3)"If you decide that the defendant was negligent and that his negligence was a proximate cause of the injuries to the plaintiffs, it is not a defense that something else may also have been a cause

of the injuries.

However, if you decide that the sole proximate cause of the injuries to the plaintiffs was something other than the conduct of the defendant, then your verdict should be for the defendant."

The ground for objection to the first two is that they do not distinguish between the conduct of the driver and of the passengers. The third, it is argued, does not distinguish between the law applicable to the passengers as opposed to the driver. The fact that the plaintiffs' objection to these instructions was not properly brought before the trial court bars any present consideration of the plaintiffs' argument. Were this not the case, however, we would find that on the record as a whole, the instructions clearly and correctly state the law in Illinois.

The judgment is affirmed.

JUDGMENT AFFIRMED.

GOLDBERG and EGAN, JJ., concur.

HONORABLE
LOUIS B. GARIPPO,
PRESIDING.

Robertson further testified that on September 9, 1971, the defendant received a telephone call on the Robertson's telephone and Ruby went across the hall and called Robinson to the telephone; that Robinson talked on the telephone for about fifteen minutes and then left, and that he came back

in about ten minutes. Robertson went to the washroom and while there heard an argument between the defendant and Ruby. He heard the defendant accusing Ruby of knowing the whereabouts of the defendant's wife. Robertson heard two shots and ran out of the washroom. He saw the defendant fire a third shot at Ruby. Robertson tried to get to the defendant but the defendant shot him in the left cheek when Robertson was about three feet away from the defendant. Robertson fell to the floor. The defendant ran from the apartment and Robertson called the police.

On cross-examination Robertson said that he did not have any arguments with the defendant, and that the defendant did not have his own telephone. Ruby Robertson initially brought the defendant's daughter to the telephone. The defendant was on the telephone for about fifteen minutes and at that time Robertson was watching TV. After the phone call the defendant left and came back in about ten minutes and then Robertson went into the washroom. He heard an argument between the defendant and Ruby in which the defendant accused Ruby of knowing the whereabouts of his wife. Robertson heard Ruby say "I don't have to take this from you" and "If you don't leave my apartment I'll call the police." Robertson then heard two shots. When Robertson came from the washroom Ruby was in a standing position. When the defendant fired the third shot at Ruby his arm was straight out from his shoulder and the gun was in his right hand. Robertson testified that he did not keep a gun around the house and never owned one. After the third shot Ruby did not fall down; she was walking around in a daze and then she sat down.

Dr. Edward Shalgos, a medical doctor on the Cook County Coroner's staff, testified for the State. He did an autopsy on the body of Ruby Robertson on September 10, 1971, and

found three bullets had entered her body. Bullet 1 struck the left side of the head and had a path such that the gun was held up to the left in relation to the scalp. Bullet 2 hit the left cheek region; internally it had a sharply defined downward course; the bullet caused a fragmentated fracture; and the pistol would clearly have to be above the level of the head. Bullet 3 entered on the right side of the nose approaching straight, if the head was held erect; and the bullet coursed backwards toward the right and slightly downward.

On cross-examination Dr. Shalgos stated that the death of Mrs. Robertson was caused by the bullets. The doctor also testified that there were no powder burns; that the bullets were small in size; and that there were no exit wounds.

It was stipulated that the doctor's protocol showed Mrs. Robertson to be 5 feet 4 inches tall. The defendant testified that he was 6 feet 1 inch tall.

The defendant testified that he took his wife and five children to Canton, Mississippi on July 5, 1971; that there were no arguments with his wife; that while his wife was down South the defendant spoke to her on the Robertson's telephone; that he spoke to his wife fifteen or twenty times and had no arguments with her at any time; and that he always paid Mrs. Robertson for the long distance phone calls.

The defendant further testified that on September 6, 1971, about 9:30 or 10:00 A.M., he went out for milk and bread and when he came back his oldest daughter said that her mother wanted to talk to him; that Mrs. Robertson was then talking to the defendant's wife; that the defendant talked to his wife for about fifteen minutes or so and then told his oldest daughter that they were going to pick up their mother at the Continental Bus Station in Chicago. The defendant hung up and then asked Mrs. Robertson if he could call his sister down South; that Mrs. Robertson asked him how about the money he owed her; that the defendant said he did not owe her any money;

that Mrs. Robertson said how about the \$1.70 bill; that the defendant told Mrs. Robertson that if she felt that way he won't use her phone any more; and that she should stay out of his house and he would stay out of hers.

The defendant testified that he told Mrs. Robertson that his wife had told him what Mrs. Robertson had said on the telephone; that the defendant told Mrs. Robertson he "don't appreciate you trying to break a family up" "because you know, it isn't true. It wasn't your business."; that Mrs. Robertson told the defendant "I'll say any damn thing I want to say in my house"; and that the defendant said to Mrs. Robertson "I'm not mad at you but just stay out of my house, I'll stay out of your house"; and that she said "Nigger, get out of my house, I don't have to take that".

The defendant further testified that he started to walk away, turned around and saw Mrs. Robertson's purse on the side of the bed, which was in the dining room; that Mrs. Robertson took a gun out of her purse; that the defendant grabbed the gun across her wrist with his left hand, bent the gun backwards from him and the gun fired several times; that Mrs. Robertson had her hand on the trigger; that his right hand was across the barrel of the gun and his left hand was across her hand and the handle of the gun and the trigger part and firing part of the gun; that as he "snatched" the gun away from her the gun went off several times; that during the course of the struggle the gun was at all times turned towards her; that at no time did he have his finger on the trigger; and that he "snatched the gun immediately away from her."

The defendant said that he was standing with the gun in his hand when Andrew Robertson came out of the bathroom and "ran smack into" him. The defendant had the gun in his right hand and tried to shove Robertson off with his left hand; and

that then "the gun discharged again." The defendant threw the gun in the chair by the telephone and walked out of the house. On September 9, 1971, the defendant gave himself up at the 39th and California Police Station.

Veras Thomas, the defendant's sister, testified that it was the custom for the defendant and his family to go down South in the summertime to visit with relatives in Mississippi; that he would take his wife down there and he would come home and after a month she would come back; and that the defendant and his wife did not have any family disputes.

It was stipulated that no weapon was recovered or shell casing found by the police officers who investigated the incident.

The defendant argues that the State failed to establish that the decedent provoked him to intense passion as required by a voluntary manslaughter conviction under Section 9-2(a) of the Criminal Code and, also, that he was not proven guilty of voluntary manslaughter under Section 9-2(b) of the Criminal Code (Ill. Rev. Stat. 1969, ch. 38, par. 9-2) because the defendant did not knowingly or willingly kill the decedent as there is no evidence that the defendant used unreasonable force.

An argument similar to that made by the defendant in the case at bar was made in People v. Adams (1969), 113 Ill.App.2d 205, 252 N.E.2d 35 (Petition for Leave to Appeal denied 41 Ill.2d 582), where the court, after quoting the provisions of Section 9-2 of the Criminal Code held that under the evidence the trial court could justly determine that the defendant may have believed that his use of deadly force was necessary in his own defense, that such belief was unreasonable; and that therefore he could reasonably be held guilty of voluntary manslaughter under the provisions of Section 9-2(b). The court also held that under the evidence the trial court could reasonably have found defendant to have acted under sudden and intense passion

regarding the provocation of what he testified was an attack by the deceased, as there was no time for the "cooling of defendant's blood"; and, therefore, his actions could be considered, with reason, to fall within the second definition of voluntary manslaughter. The court concluded that under either definition of the crime, the trial court's decision finds adequate support in the record. Also see People v. Love (1973), 10 Ill.App.3d 554, 294 N.E.2d 737 (Abst.opinion) and People v. Odum (1972), 3 Ill.App.3d 538, 279 N.E.2d 12.

In the case at bar there was ample evidence to prove the defendant guilty either under Section 9-2(a) or Section 9-2(b) of the Criminal Code. Provocation began to develop in an argument about something Ruby Robertson said to the defendant's wife about the defendant's activities while his wife was down South. The defendant said he didn't "appreciate" Mrs. Robertson "trying to break up my home, you know it wasn't true. It wasn't your business." After more name calling the defendant testified that Mrs. Robertson reached in a purse for a gun. The deadly weapon, together with a situation already strained by sudden and intense passion, was sufficient "serious provocation" by Mrs. Robertson to justify the trial court to find the defendant guilty of voluntary manslaughter. People v. Stepheny (1966), 76 Ill.App.2d 131, 221 N.E.2d 798 (Petition for Leave to Appeal denied 35 Ill.2d 631).

The trial court, in reviewing the evidence, said that the testimony of the defendant with respect to the shooting is "really unreasonable"; that "it is physically impossible for a gun to be in the right hand of the deceased and for the injuries to be inflicted the way Dr. Shalgos testified they were"; and that "it just couldn't be done that way." The trial court also stated that "the State's case, in light of all the evidence, doesn't exclude the hypothesis or theory of voluntary manslaughter in that the provocation didn't in some way come from the deceased"; and that "The defendant could have

been acting unreasonably in his belief that he was justified in the use of force that he did". The trial court concluded that "under the two theories of voluntary manslaughter the State's evidence doesn't exclude either of the two theories of voluntary manslaughter" and, therefore, the trial court entered a finding of guilty of voluntary manslaughter.

Also, during the argument on aggravation and mitigation, counsel for the defendant stated that "both sides will agree there was some type discussion, probably a heated discussion, that preceded the shooting."

In light of the foregoing, it is apparent that there is sufficient evidence in the record to support a finding of guilty of voluntary manslaughter and, therefore, the conviction was proper.

The defendant also argues that his conviction for aggravated battery should be reversed because he was not proven guilty beyond a reasonable doubt; and that the State failed to prove that the shooting was not in self-defense.

The evidence shows that Robertson was in the washroom when he heard an argument between his wife, Ruby Robertson, and the defendant; and that he then heard two shots and rushed out of the washroom in time to see the defendant fire the third shot into the body of his wife. Robertson then rushed at the defendant and when he was about three feet away the defendant shot him in the cheek. The defendant testified that Robertson came out of the bathroom as the defendant was standing there with the gun in his hand; that Robertson ran into him; that the defendant tried to shove him away with his left hand; and that as Robertson hit the defendant's wrist the gun discharged. On cross-examination the defendant testified that he had the gun completely in his hand when Robertson came out of the washroom; that there was no struggle between Robertson and the defendant; that as Robertson grabbed for the defendant's hand the gun went off; and that when Robertson was shot he was about three or four feet away, maybe closer, to the defendant.

The trial court, in summarizing this testimony, stated:

"We do know that certainly Mr. Robinson was in such a state that by the time Mr. Robertson came out of the bathroom there was virtually nothing being done, virtually no encounter between the two, and you have a shot being fired at Mr. Robertson also."

From the foregoing it is apparent that the defendant did not shoot Mr. Robertson in self-defense. At most, there is a conflict as to whether or not it was necessary for the defendant to shoot Robertson in self-defense when Robertson was three feet away. In either event it was a question of fact to be determined by the trial court. In a bench trial, it is the responsibility of the trial judge to determine the credibility of the witnesses and the weight to be given their testimony, and unless the evidence is so unsatisfactory as to raise a reasonable doubt of the defendant's guilt, the finding of the trial judge will not be disturbed. People v. Bracey (1970), 129 Ill.App.2d 57, 262 N.E.2d 748; People v. Catlett (1971), 48 Ill.2d 56, 268 N.E.2d 378; People v. Simental (1973), 11 Ill.App.3d 537, 541, 297 N.E.2d 356.

The trial court was in a better position to observe the demeanor of the witnesses during the trial. Under such circumstances, this court will not disturb the judgment of the trial court.

Finally, the defendant argues that the imposition of a concurrent three to fifteen year sentence for voluntary manslaughter and a one to ten year sentence for aggravated battery was excessive.

A sentence imposed by the trial judge who sees the defendant and is, therefore, in a better position to appraise him and to evaluate the likelihood of his rehabilitation than a reviewing court should not be reduced unless there are substantial reasons for doing so. People v. Taylor (1965), 33 Ill.2d 417, 211 N.E.2d 673; People v. Kendricks (1972), 4 Ill.App.3d 1029, 283 N.E.2d 273. The sentences in the case

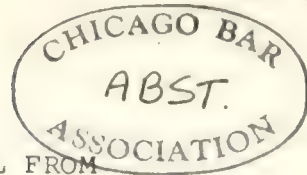
at bar were within the limits prescribed by the legislature and are not at variance with the purpose and spirit of the law or in excess of the proscriptions found in the Illinois Constitution and therefore they should not be reduced. People v. Odum (1972), 3 Ill.App.3d 538, 279 N.E.2d 12.

The cases cited by the defendant are not applicable to the facts in the case at bar.

There is no reversible error in the record and, therefore, the judgment of the trial court is affirmed.

JUDGMENT AFFIRMED.

Egan, J., did not participate.



58232

EDWARD F. COSENTINO, MARY ANN	)	APPEAL FROM
COSENTINO and BLAKE COSENTINO,)	
d/b/a CBA TRUCK LEASE COMPANY,	)	CIRCUIT COURT,
Plaintiffs-Appellants,)	
	)	COOK COUNTY.
vs.)	
	)	HON. JOSEPH B. HERMES,
ADDIS JONES and STEVE KOVACK,	)	Presiding.
d/b/a THOMAS HOIST COMPANY,)	
Defendants-Appellees.)	

*PER CURIAM (FIRST DIVISION, FIRST DISTRICT):

Plaintiffs appeal from an order of the trial court vacating an ex parte judgment entered November 5, 1971, against Addis Jones, defendant, in the sum of \$2,673.40 and argue 1) that the section 72 petition did not allege the exercise of due diligence, 2) that the defendant was not diligent since he failed to obtain a lawyer and file an answer, and 3) that the section 72 petition did not establish a meritorious defense. Defendant has not appeared or filed a brief in this court.

On August 27, 1971, plaintiffs, Edward F. Cosentino, Mary Ann Cosentino and Blake Cosentino, d/b/a CBA Truck Lease Company, filed an amended complaint against Addis Jones and Steve Kovack, d/b/a Thomas Hoist Company, as defendants. The complaint alleged that pursuant to a written contract, plaintiffs leased certain vehicles to the defendants for which a total of \$2,673.40 was owed. Judgment was sought "against defendants, Addis Jones and Steve Kovack individually and d/b/a CBA Truck Lease Company"(sic). The contract, signed by Edward F. Cosentino as lessor and "Steve Kovack--Thomas Hoist Company," as lessee, provided in part in clause 2 as follows:

"2) The THOMAS HOIST COMPANY hereinafter called the Lessee is desirous of leasing for various periods of time such motor vehicles as CBA Truck Lease Company can and will make available to him."

Defendant Jones was served personally on October 5, 1971, and on October 15, 1971 (the return date), he filed his appearance and jury demand. On November 5, 1971, the defendant not appearing in court and having failed to file an answer was defaulted and judgment entered against him for \$2,673.40. On February 9, 1972, defendant Addis Jones filed his petition and affidavit to vacate the judgment of November 5, which stated the facts to be as follows: That on August 12, 1971, a confession of judgment against Thomas Hoist Company was had and thereafter vacated; Thomas Hoist Company has been an Illinois corporation for more than 50 years; the appearance of Addis Jones was intended to be on behalf of the corporation; Addis Jones is not a lawyer; he was not informed that an answer must be made within a prescribed time; Addis Jones does not own Thomas Hoist Company, but has been an employee of the company for a number of years and is the "Managing Director" of the company; at no time did he enter into any personal contract with the plaintiffs; a "Commissioner's Notice" from the Sheriff's office was served on his household to the effect that his house would be sold to satisfy the judgment; when he received this notice from the Sheriff he informed his attorney; he was out of town for 30 days since November 5.

A defendant seeking relief from a default judgment under section 72 of the Civil Practice Act must set forth sufficient facts to show both a meritorious defense and due diligence on his part, although the petition is addressed to the equitable powers of the court, "as justice and fairness require, to the end that one may not enforce a default judgment attended by unfair, unjust or unconscionable circumstances." Elfman v. Evanston Bus Co., 27 Ill.2d 609, 613, 190 N.E.2d 348, 350.

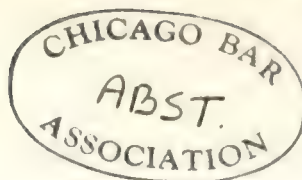
The trial court has considerable discretion which will not be reversed upon appeal, absent a clear showing of abuse. (City of Des Plaines v. Scientific Mach. Movers, Inc., 9 Ill.App.3d 438, 292 N.E.2d 154.) The record here indicates that the defendant did in fact appear on the return date and that he satisfied the trial court that he had been diligent and that he had a meritorious defense. The defendant did not treat the court's command to appear with indifference. Instead, he appeared personally on the return date indicated on the summons, and filed his appearance and jury demand. Defendant stated in his section 72 petition that he did not understand, as a layman, that an answer had to be filed and, presumably, he expected to be notified as to the time of the next appearance. This was not a course of conduct which would reasonably lead the plaintiffs and the court to believe that the defendant "did not wish to contest the suit." Bernier v. Schaefer, 11 Ill.2d 525, 144 N.E.2d 577; Davis Furniture Co. v. Young, 102 Ill.App.2d 415, 242 N.E.2d 457, cited by the plaintiffs, is distinguishable in that defendant there had an attorney who appeared in a garnishment proceeding within nine days of the entry of the underlying judgment; the court held that defendant should have been put on notice of the underlying judgment and his failure to move to vacate that judgment until some 77 days thereafter was not an excusable mistake.

Defendant's petition under section 72 must also contain allegations which, if true, show a good and meritorious defense to the plaintiffs' complaint. (Keel v. Kostka, 106 Ill.App.2d 172, 245 N.E.2d 607.) While it is true, as the plaintiffs point out, that the defendant's petition does not allege that he (i.e., Addis Jones) has a meritorious defense (the petition does allege that Thomas Hoist Company has a meritorious defense), it is also true that

defendant's petition and affidavit state facts that do constitute such a defense. The defendant does allege in his petition that the contract sued upon does not contain his name, either individually or in a representative capacity. While the defendant referred to himself in his affidavit as the "Managing Director of the company," he apparently is not an officer of the corporation, but simply an employee. While there are some situations in which an officer or an agent of a corporation may be held liable, such liability must be determined by the trial court. See, for example, McAteer v. Menzel Building Company, Inc., (Fifth District: August 15, 1973), ___Ill.App.3d___, ___N.E.2d___, General Number 72-30. Defendant's allegations therefore were sufficient to meet the requirements of section 72 that a meritorious defense to the plaintiffs' complaint be stated. The section 72 petition, therefore, set forth both due diligence and a meritorious defense and the trial court properly exercised its discretion in setting aside the judgment of November 5, 1971. Accordingly, the judgment of the Circuit Court of Cook County is affirmed.

JUDGMENT AFFIRMED.

* Justice Goldberg took no part.



57367

CITY OF CHICAGO, a Municipal Corporation,	)	APPEAL FROM
)	
Plaintiff-Appellee,	)	CIRCUIT COURT,
)	
vs.	)	COOK COUNTY.
)	
JOHN A. HUTTER, et al.,	)	HON. LOUIS A. WEXLER,
	)	Presiding.
Defendants-Appellants.))	

MR. PRESIDING JUSTICE BURKE delivered the opinion of the court:

Defendants appeal from an order entered on March 23, 1972, by the Circuit Court of Cook County appointing Charles B. Zeller, Jr., receiver of an apartment building owned by defendants and located at 3526-28 North Marshfield Avenue, Chicago.

In order to facilitate a better understanding of the present appeal, we deem it necessary to delineate the procedural history of this litigation.

The litigation commenced in 1967 when the City of Chicago initiated a complaint against the defendants in the Circuit Court of Cook County. The complaint alleged that the apartment building owned by the defendants, located at 3526-28 North Marshfield Avenue in Chicago, was in violation of Sections 78-15.1 and 67-4 of the Municipal Code of Chicago.

After a bench trial, Judge Alvin J. Kvistad presiding, the Court held that some of the fourth floor apartments in the defendant's building lacked adequate means of ingress and egress, in violation of the aforementioned sections of the Municipal Code. A mandatory injunction was issued ordering the defendants to vacate any two of the fourth floor apartments. The defendants appealed the mandatory injunction order to this Court which decided all issues on the merits against the defendants and affirmed

the trial court's decision. (City of Chicago v. Hutter, 110 Ill. App.2d 321, 249 N.E.2d 184.) Defendants petitioned for leave to appeal to the Illinois Supreme Court, No. 42401, which petition was denied on September 25, 1969. Defendants subsequently petitioned the Illinois Supreme Court for reconsideration of its previous denial of leave to appeal. This petition was dismissed on November 19, 1969. Defendants then proceeded to petition the United States Supreme Court for a writ of certiorari, No. 954, Oct. Term 1969, which was denied on February 24, 1970.

The case was returned to the trial court for compliance with the mandatory injunction. The defendant failed to so comply and was subsequently cited for contempt of court and was fined \$500 on October 9, 1970. The defendant then filed a notice of appeal and petitioned the Illinois Supreme Court to transfer the appeal directly to that Court. This petition, No. 44126, was denied by the Illinois Supreme Court on March 18, 1971, and the case was returned to this Court. Subsequently this Court affirmed the defendant's conviction for contempt. This Court also exercised its power pursuant to Rule 615 (b) (4) (Ill.Rev.Stat., 1969, ch. 110A, par. 615 (b) (4)) to reduce defendant's fine to \$100 for the express purpose of facilitating defendant's compliance with the mandatory injunction, and affording defendant an opportunity to "make his peace with the proper authorities." (City of Chicago v. Hutter, 2 Ill.App.3d 1104, 278 N.E.2d 185 (Abstract)). The defendant then petitioned the Illinois Supreme Court for leave to appeal. This petition, No. 44974, was denied on March 29, 1972. Subsequent to this denial, defendant proceeded to petition for a writ of certiorari from the United States Supreme Court. This petition, No. 72-447, was denied on November 20, 1972.

After the case had been returned to the trial court for compliance

with the injunction, the defendant was again cited for contempt of court for failure to comply. The defendant appealed this judgment of contempt to this Court, petition No. 57165, which dismissed the appeal on May 9, 1972. This Court then denied, on June 6, 1972, defendant's motion to reverse the dismissal entered on May 9, 1972. Defendant then filed in this Court a petition for reconsideration of the dismissal, which was denied on August 7, 1972. A similar petition subsequently made by defendant was denied on October 16, 1972.

Defendant petitioned the Illinois Supreme Court for leave to appeal, No. 45544. This petition was denied by the Illinois Supreme Court on January 25, 1973.

On March 23, 1972, the trial court appointed Charles B. Zeller, Jr., as receiver of the defendant's building at 3526-28 North Marshfield Avenue. After entry of this order the receiver proceeded to request defendant Marian Coy for a list of all tenants and their respective rents. Marian Coy was the daughter of the Hutters and acted as their agent for the purpose of collecting rents. Defendant Coy refused to cooperate, and a rule to show cause why she should not be held in contempt of court for failure to comply with the order of March 23, 1972, was issued against her.

On April 18, 1972, defendants filed the present appeal, from the order of March 23, 1972 appointing Charles B. Zeller, Jr., as receiver. On June 2, 1972, this Court issued a stay order staying enforcement of the March 23, 1972 order, appointing the receiver.

At the outset, we observe that the notice of appeal filed by defendants in the present appeal is defective. The notice of appeal fails to conform to the requirements delineated in Rule 303 (c)(2) (Ill. Rev.Stat. 1971, ch. 110A, par. 303 (c)(2)) in that it fails to state

the relief sought by appellants. However, we are of the opinion that defendants' error is one of form and not of substance and we can perceive no resultant prejudice to appellee and therefore we shall proceed to consider defendants' appeal on the merits.

National Bank of The Republic of Chicago v. Kaspar American State Bank, 369 Ill. 34, 15 N.E.2d 721.

Defendants argue that the March 23, 1972 order of Judge Wexler appointing Charles B. Zeller, Jr., as receiver of their building was improper. The basis of their contention is that a "supersedeas" order was in effect at the time and therefore the trial court was allegedly divested of jurisdiction. The parties in their briefs and argument used the term "supersedeas"; however, when Rule 305 was amended in 1971 the use of the term "supersedeas" was abandoned and the present designation is "stay" order. (Ill.Rev.Stat., 1971, ch. 110A, par. 305 (b) (1); see also Committee Comments to Rule 305, Ill.Ann.Stat. 1973-74 Cum. Supp. ch. 110A, par. 305). We shall hereinafter utilize the present designation, namely "stay" order.

The authority for granting and the rules governing stay orders are set forth in ch. 110A, par. 305 (b) (1) (Ill.Rev.Stat. 1971, ch. 110A, par. 305 (b) (1)) which provide that the trial or reviewing court may stay pending appeal "the enforcement, force and effect of any other final or interlocutory judgment or judicial or administrative order." The paragraph is clear and unequivocal as to the effect of a stay order, namely that it stays the enforcement of the order or judgment appealed from.

There is no reference in defendants' abstract or in the record to a stay order in effect on Mar.23,1972, the date on which Judge Wexler appointed the receiver. The only reference made to a stay order in defendants' abstract and in the record is the stay order issued by this Court on June 2, 1972, restraining enforcement of the

March 23, 1972 order.

We are of the opinion that the stay order issued by this Court on June 2, 1972 had no effect on the trial court's jurisdiction to appoint a receiver on March 23, 1972. This conclusion we believe, is clear from the June 2, 1972 stay order which states in relevant part that the order "operates to suspend enforcement of the order entered on March 23, 1972." The purpose of a stay order is to stay all future proceedings and to restrain the appellee from taking affirmative action to enforce his judgment but a stay order does not impair the validity or effect of the judgment. Western United Dairy Co. v. Miller, 40 Ill.App.2d 403, 189 N.E.2d 786; Nemanich v. Long Grove Country Club Estates, 119 Ill.App.2d 169, 255 N.E.2d 466.

The defendants in their argument also rely upon a stay order allegedly issued by the trial court in a prior appeal from the judgment of contempt. (Ill.App.Ct. 1st Dist.No. 55302, City of Chicago v. Hutter, 2 Ill.App.3d 1104, 278 N.E.2d 185 (Abstract)). Defendants maintain that this stay order allegedly issued on October 9, 1970 "was in effect" when the trial court appointed the receiver on March 23, 1972, and therefore the trial court did not have jurisdiction to appoint the receiver.

Defendants have not seen fit to include the alleged stay order of October 9, 1970, in either their abstract or in the record. Moreover, we are of the opinion that the abstract and record are not sufficient to fully present this claimed error and we cannot consider defendants' contention as to the alleged stay order of October 9, 1970.

Defendants also argue some vague and conclusory allegations relating to alleged deprivation of their constitutional rights. We are of the opinion that these issues were neither presented

nor litigated in the trial court and therefore cannot be raised on appeal. Goodrich v. Sprague, 376 Ill. 80, 32 N.E.2d 897; Murphy v. Kumler, 344 Ill.App. 287, 100 N.E.2d 660.

The mandatory injunction was originally issued by Judge Kvistad in 1968. As of March 23, 1972, the date on which Judge Wexler appointed the receiver, defendants had still not complied with the injunction. Moreover, the violations in defendants' buildings are of a continuing nature and have rendered the property unsafe and a danger to the community.

As the Illinois Supreme Court stated in Community Renewal Foundation, Inc. v. Chicago Title and Trust Co., 44 Ill.2d 284, 291, 255 N.E.2d 908, 913:

"We regard the appointment of a receiver to obtain compliance with the building codes, where because of continuing violations the property has become unsafe and a danger to the community, as within the inherent powers of an equity court. (See 45 Am. Jur., Receivers, 830-32, 842; Clark, Law of Receivers, §46.)"

We are of the opinion that upon consideration of the facts and circumstances of this case, the order appointing a receiver was proper.

For these reasons, the judgment of the Circuit Court of Cook County appointing a receiver is affirmed.

JUDGMENT AFFIRMED.

GOLDBERG and EGAN, JJ., concur.

NO. 54328

PEOPLE OF THE STATE OF ILLINOIS,)
)
 Appellee,)

APPEAL FROM
 CIRCUIT COURT
 COOK COUNTY

vs.

VAN J. ROSS,

Appellant



HONORABLE
 L. SHELDON BROWN,
 PRESIDING.

MR. JUSTICE LEIGHTON delivered the opinion of the court:

In a four-count indictment, appellant Van J. Ross and a co-defendant, Harlan DeSavieu, were jointly charged with two counts of attempt murder and two counts of aggravated battery. They were tried by the same jury, found guilty on all counts and sentenced to serve four concurrent sentences, two for attempt murder and two for aggravated battery. DeSavieu took a separate appeal and in an accompanying opinion we have affirmed his convictions for the attempts to murder. See People v. DeSavieu, ___ Ill. App. 3d ___, ___ N.E. 2d ___ (No. 54327).

Ross alone brings this appeal and presents six issues for our review. We will resolve each issue after a summary of the material facts.

I.

At about 4:30 P.M. on May 23, 1968, Eugene Shanklin, age 17, and Melvin Baxter, age 14, were waiting for a "jitney" cab at East 58th Street and South Park Avenue in the City of Chicago.^{1/} They saw some boys come out of a nearby building. Moments later, they heard one or two shots. A tree branch fell to the ground. Thinking that someone was shooting at them, Shanklin and Baxter ran approximately six blocks to a point near East 52nd Street and Bowen Drive in Washington Park.

1/

South Park Avenue has been renamed "Dr. Martin Luther King Drive," in honor of the late civil rights leader who was assassinated in Memphis, Tennessee on April 4, 1968.

In his testimony later, Shanklin said that he knew appellant. In fact, they had been acquainted for about five years. He said that he also knew Harlan DeSavieu. They had known each other for about nine months. Although Melvin Baxter testified that he knew appellant, he said he did not know DeSavieu before May 23, 1968.

Shanklin testified that after he and his companion had run some six blocks away from the shooting at 58th Street, he saw a boy behind a tree; that the boy came out, shot him and then shot Melvin Baxter in the stomach and in the back. Shanklin told the jury that after he was wounded, he tried to cross East 51st Street and reach a hospital there, but a brown and white " * * * car drove up and tried to stop me from going to the hospital." Melvin Baxter also testified and described the shooting. In court, he and Shanklin identified DeSavieu as the boy who shot them. Shanklin identified appellant as the driver of the car that tried to stop him from reaching the hospital. During cross-examination, Shanklin said that when he first saw the police, he told them that DeSavieu shot him and that appellant was with him. Then, Shanklin was asked, "Did you ever say that Tyrone [Clark] was the one that shot you?" He answered, "Yes, in the police station."

In support of Shanklin and Baxter, the prosecution called three witnesses who gave testimony concerning the shooting. Fifteen year old Tyrone Clark told the jury that in the afternoon of May 23, 1968, while in a drug store at 58th Street and Calumet Avenue, he saw Eugene Shanklin and Melvin Baxter walk by. He went to an apartment on East 58th Street, there found DeSavieu and appellant and told them he had seen the two youths. DeSavieu said, "[C]ome on." Clark and DeSavieu left the apartment. They went through an alley and some gangways until they reached South Park Avenue. They saw Shanklin and Baxter at the "jitney" cab stop. Clark testified that DeSavieu "pulled out a gun * * * got behind a porch and fired twice." Shanklin and

Baxter "ran through the park." Clark said that he and DeSavieu then returned to the apartment. When they got there, DeSavieu went into a bedroom with appellant. Clark recalled that he could hear appellant say, "We can catch them in my car." Appellant's car was brown and white. Clark said that DeSavieu and appellant left the apartment. After fifteen minutes, they returned. Then, in the presence of DeSavieu and several others, appellant told them "[i]t was a wipe-out set, you should have been there. Harlan [DeSavieu] shot down Melvin [Baxter] like a piece of paper and then he shot Eugene [Shanklin] while he was running."

Terrence Bell, who Clark recalled was among his companions the afternoon of May 23, 1968, described his presence in the apartment when DeSavieu and appellant left. He said that one half hour later, they returned and appellant told them about the "wipe-out set" and that "we all should have been there." According to Bell, DeSavieu recounted that he and appellant got in the car and then " * * * saw Eugene and another boy. He [DeSavieu] said he jumped out of the car and the boys started running and he started shooting."

Clarence Britts was called and he told how he was in Washington Park with his family the afternoon of May 23, 1968 between 5:00 and 5:30 P.M. when he "saw two youngsters running through the park * * *. I turned around to open up a bottle of pop and I heard shots. * * * I looked for the boys and I found one falling down the bridle path."

The defense called four witnesses: (1) Mary Wright. She testified that she lived in the apartment on East 58th Street. She knew Tyrone Clark. He had been in her apartment on May 23, 1968, but left about 4:00 P.M. She knew that Shanklin was in the neighborhood that day. She was acquainted with appellant, and she recalled that he was in her apartment the day in question, but it was before Shanklin arrived in the area. As to DeSavieu, all she could say was that "I don't remember seeing

him in the apartment that day." (2) Richard Lis. He appeared and told the jury that on May 23, 1968, he was a Chicago police detective and questioned Eugene Shanklin after he was shot in Washington Park. Lis was asked, "Do you know if Shanklin identified Tyrone Clark as the boy who shot him?" Lis answered, "At one point, yes." (3) Appellant. He admitted knowing Shanklin and Baxter and having seen them the afternoon of May 23 near East 58th Street. He knew the owners of the apartment on East 58th Street, but he was not in the apartment after he saw the two youths. He did not see DeSavieu on May 23. He denied having made the statements attributed to him by Clark and Bell or in any way being involved in the shooting of Shanklin and Baxter. (4) DeSavieu. He denied knowing Shanklin or Baxter. He said that he did not see them on May 23, 1968. He denied ever being in the apartment described by Tyrone Clark, and he denied ever having fired any shots at or assaulting either Shanklin or Baxter.

After hearing the evidence, listening to closing arguments and receiving its instructions, the jury deliberated and found appellant guilty of all the charges. The trial court imposed the four concurrent sentences. We will now resolve the issues.^{2/}

II.

First. Whether appellant was proven guilty beyond a reasonable doubt.

Appellant contends the State did not prove beyond a reasonable doubt that on May 23, 1968 he committed either attempted murder or aggravated battery. Concerning the attempt to murder, he rests this contention on the fact that, according to the State, DeSavieu, in a common design with appellant, committed that offense at the "jitney" cab stand, East 58th Street and

^{2/} Without reflecting in any way on their relative importance, we have rearranged the order and rephrased the wording of the issues as they are presented in appellant's brief.

South Park Avenue. It was the State's theory that because of this fact, appellant was accountable for DeSavieu's conduct. Appellant, however, argues that the State failed to produce any evidence which proved he aided and abetted DeSavieu in the shooting at the cab stand.

We agree with appellant. In our judgment, the State's failure went further. Not only did it fail to prove a common design by appellant with DeSavieu at that time and place; it did not prove commission of that offense by DeSavieu in the first shooting incident. For this reason, in DeSavieu's separate appeal, we were constrained to hold that, even as to him, the State's evidence did not prove an attempt to murder at the "jitney" cab stand. See People v. DeSavieu, ___ Ill. App. 3d ___, ___, ___ N.E. 2d ___ (No. 54327). Therefore, appellant cannot be accountable for conduct that was not part of a common design to commit an offense. See People v. McClelland, 96 Ill. App. 2d 410, 238 N.E. 2d 597; compare People v. Hubbard, 4 Ill. App. 3d 729, 281 N.E. 2d 767. This conclusion, however, leaves unresolved the question whether the State's evidence proved beyond a reasonable doubt that, as a person accountable for DeSavieu's conduct in Washington Park, appellant was guilty of the offenses charged in the indictment.

Our law provides that "[a] person is legally accountable for the conduct of another when * * * either before or during the commission of an offense, and with the intent to promote or facilitate such commission, he solicits, aids, abets, agrees or attempts to aid, such other person in the planning or commission of the offense." Ill. Rev. Stat. 1969, ch. 38, par. 5-2(c). One may aid and abet the commission of an offense without actively participating in the overt act. (People v. Brendland, 10 Ill. 2d 469, 140 N.E. 2d 708; People v. Bracey, 110 Ill. App. 2d 329, 249 N.E. 2d 224.) A person who voluntarily attaches himself to a group bent on illegal conduct with knowledge of the illegal design, provides an inference that he

shared in the common purpose. (People v. Raybourn, 72 Ill. App. 2d 379, 219 N.E. 2d 711.) That inference will sustain his conviction for an offense committed by any member of the group. See People v. Hairston, 46 Ill. 2d 348, 263 N.E. 2d 840.

In this case, Tyrone Clark testified that on May 23, 1968, in the apartment on East 58th Street, he heard appellant tell DeSavieu that they could use his car to pursue Shanklin and Baxter. Clark and Terrence Bell described to the jury how appellant left the apartment with DeSavieu, returned later and with apparent jubilation, reported to those assembled how he and DeSavieu had overtaken and shot their victims. Shanklin told the jury that he saw and recognized appellant as the driver of the car that was used to bar his way to a hospital where he could be treated for his gun shot wounds. Baxter, who also knew appellant, thought he recognized him as the driver of the car. Therefore, the State introduced enough legally credible evidence which if believed by the jury proved beyond a reasonable doubt that appellant aided and abetted DeSavieu in shooting Shanklin and Baxter.

It is true that appellant's testimony and that of defense witnesses conflicted with the testimony of witnesses who testified for the State. However, a conflict in the testimony or alternative explanations of the conduct involved is not incompatible with proof of appellant's guilt beyond a reasonable doubt. (People v. Hatch, 49 Ill. App. 2d 177, 199 N.E. 2d 81.) It is axiomatic that where there is conflict in the evidence, the conclusions and inferences to be drawn from it rest on which witness a jury chooses to believe. People v. Galloway, 28 Ill. 2d 355, 192 N.E. 2d 370. Here the jury chose to believe the State's witnesses. Its unwillingness to believe the defense witnesses does not create reasonable doubt of appellant's guilt. On the contrary, the evidence which

the jury believed proved beyond a reasonable doubt that appellant was guilty of the crimes with which he was charged. See People v. Irvin, 104 Ill. App. 2d 316, 244 N.E. 2d 351.

Second. Whether, on the facts of this case, the concurrent sentences imposed on appellant for two attempts to murder and two aggravated batteries were proper.

In DeSavieu's appeal, we considered this issue in the same factual context in which it is presented by appellant. In doing so, we studied the facts, applied the law and concluded that the two attempts to murder and the two aggravated batteries with which appellant was charged arose out of the same conduct: the shooting in Washington Park where Shanklin and Baxter were wounded. Consequently, in an opinion that fully discussed the issue, we held that imposition of concurrent sentences for the attempts to murder and the aggravated batteries was improper. It is unnecessary for us to repeat here what we said in that opinion but refer to it as authority for an identical holding in this case. See People v. DeSavieu, ___ Ill. App. 3d ___, ___, ___ N.E. 2d ___ (No. 54327). Therefore, appellant's two concurrent sentences of 6 to 10 years for the aggravated batteries which were concurrently imposed with the two sentences of 8 to 15 years for attempts to murder must be vacated.

Third. Whether the trial court abused its discretion when it ruled on objections to questions asked during cross-examination of State witnesses.

Appellant presents this issue from seven instances in which he contends the trial court abused its discretion when it sustained objections that restricted his cross-examination of State witnesses. This issue, based on the same instances, was presented to us by appellant's co-defendant in People v. DeSavieu, ___ Ill. App. 3d ___, ___, ___ N.E. 2d ___ (No. 54327). In resolving it, we studied the instances, considered them in the context of their relevance to the evidence in the case and

concluded that none of them showed abuse of discretion by the trial court. Without repeating what we said in DeSavieu, and referring to that case as authority, we make the same holding in this appeal.

Fourth. Whether the trial court abused its discretion when it examined appellant's co-defendant, DeSavieu, in the course of his testimony as a defense witness.

This issue, based on the same examination of DeSavieu, was presented for our review in the companion case, People v. DeSavieu, ___ Ill. App. 3d ___, ___, ___ N.E. 2d ___ (No. 54327). In considering and deciding the issue, we studied the questions asked of DeSavieu by the trial judge in the context of DeSavieu's testimony and that of appellant, which, in our judgment, made the examination proper. We said that "[a] trial judge is not required to sit mute even in a jury trial; he may ask questions to elicit the truth and clarify the issues." (People ex rel. Adams v. Sanes, 41 Ill. 2d 381, 386, 243 N.E. 2d 233.) In our judgment, the same conclusion should be reached in this appeal. Accordingly, we hold that the trial court did not abuse its discretion when it examined appellant's co-defendant, DeSavieu, in the course of his testimony as a defense witness. See People v. DeSavieu, ___ Ill. App. 3d ___, ___, ___ N.E. 2d ___ (No. 54327).

Fifth. Whether the closing arguments to the jury by two assistant state's attorneys deprived appellant of a fair trial.

Appellant contends that he was deprived of a fair hearing and an unbiased jury determination of the case against him by improper and inflammatory remarks made during the closing arguments of two assistant state's attorneys. Appellant argues that in at least five instances during their summations, the lawyers for the State repeatedly referred to his membership in the "Disciples," called him and his co-defendant "devils" and "thugs," suggested to the jurors that they could convict appellant and his co-defendant because of their gang membership

and accused defense counsel of throwing "a smoke screen" in an attempt to degrade prosecution witnesses. Appellant maintains that these five instances deprived him of a fair trial.

We do not approve of opprobrium or denunciation by lawyers when they argue their case to a jury. Given the rich range of expression possible in American English, lawyers, for the defense or the prosecution, should be able to sum up their case without resort to language that may subject a trial to the charge that it was unfair. However, when based on the evidence or its legitimate inferences, a lawyer for the prosecution " * * * may reflect unfavorably upon an accused, denounce his wickedness, dwell on the evil results of crime and even indulge in invective in urging a fearless administration of the law * * *." (People v. Murdock, 3 Ill. App. 3d 746, 752, 279 N.E. 2d 159; compare People v. Vasquez, 118 Ill. App. 2d 66, 254 N.E. 2d 617; United States v. Cook (7 Cir. 1970), 432 F. 2d 1093.) In a case like this one, where the evidence showed that appellant and his co-defendant belonged to a street gang known as the "Devil's Disciples," and that appellant joined his co-defendant armed with a gun in the pursuit of two youths whom they shot, calling them "devils" and "thugs" might have been unkind but it was not unfair. In any event, the remarks of a prosecuting attorney will not constitute reversible error unless they result in substantial prejudice to an accused. (People v. Nilsson, 44 Ill. 2d 244, 255 N.E. 2d 432.) Our examination of the record does not reveal any prejudice to appellant from what was said to the jury. Therefore, appellant was not deprived of a fair trial by the closing arguments of the two assistant state's attorneys.

Sixth. Whether the sentences are excessive.

Appellant contends that the concurrent sentences are excessive and should be reduced by us through exercise of the

powers we have under Supreme Court Rule 615(b)(4), Ill. Rev. Stat. 1969, ch. 110A, par. 615(b)(4). He argues that prior to this case he had never been convicted of a felony; that he successfully served a probation in 1966 and was gainfully employed on the day of the offenses. Therefore, his sentences should be substantially reduced. Since we have ruled that the sentences for aggravated battery must be vacated, appellant's contention applies only to the two sentences of 8 to 15 years for the attempts to murder.

We have authority, in an appropriate case, to reduce a sentence imposed in the trial court. (People v. Kalagian, 6 Ill. App. 3d 582, 285 N.E. 2d 510; Supreme Court Rule 615(b)(4), Ill. Rev. Stat. 1969, ch. 110A, par. 615(b)(4).) However, this authority is reserved for the case in which the punishment imposed is excessive. (People v. Pahl, 124 Ill. App. 2d 177, 260 N.E. 2d 405.) It is a power we should exercise only when a sentence "* * *" is in manifest disproportion to the nature of the offense or 'greatly at variance with the purpose and spirit of the law.'" People v. Swet, 132 Ill. App. 2d 468, 469, 270 N.E. 2d 646.

In this case, bearing in mind the nature of the offenses and the circumstances of their commission, we are of the view that the concurrent 8 to 15 year sentences imposed on appellant for two attempts to murder are not excessive.

III.

For these reasons, the two concurrent sentences of 6 to 10 years for aggravated battery are vacated. In all other respects, the judgments are affirmed.

Vacated in part; affirmed in part.

Drucker, J. and Hayes, J., Concur.

Publish abstract only.

58743

PEOPLE OF THE STATE OF ILLINOIS,)	
)	
Respondent-Appellee,	)	APPEAL FROM THE CIRCUIT COURT
	)	OF COOK COUNTY.
vs.)	
)	
HENRY A. LAURANT,	)	HONORABLE NATHAN KAPLAN,
	)	Presiding
Petitioner-Appellant.))	



PER CURIAM:

Henry A. Laurant, petitioner, appeals from an order dismissing his amended post-conviction petition filed pursuant to the Post-Conviction Hearing Act (Ill. Rev. Stat. 1969, ch. 38, par. 122-1 et seq) without an evidentiary hearing.

Petitioner was originally charged by indictment with the crimes of aggravated battery and attempt murder. After a jury trial, he was found guilty of both offenses and sentenced to a term of not less than ten nor more than fifteen years. Petitioner appealed and on October 30, 1970, this court affirmed the judgment of conviction. People v. Laurant, 131 Ill.App.2d 193, 264 N.E.2d 886. On February 20, 1969, petitioner had filed a pro se post-conviction petition. An attorney was appointed to represent petitioner. Appointed counsel filed an amended post-conviction petition. On October 17, 1972, upon motion of the State, the amended post-conviction petition was dismissed without an evidentiary hearing.

Petitioner wished to appeal from the dismissal of the amended post-conviction petition and the public defender of Cook County was appointed to represent him, but after examining the record, the public defender has filed a petition in this court for leave to withdraw as appellate counsel. Pursuant to the requirements set out in Anders v. California, 386 U.S. 738, a brief in support of the petition has also been filed. That brief in effect states that an appeal in this case is wholly frivolous and without merit. Defendant

was mailed copies of the petition and brief. He was informed that he could file any points he might choose in support of his appeal by September 6, 1973. He has not responded.

The petition and brief of the public defender allege that the only possible basis for an appeal would be whether petitioner was entitled to an evidentiary hearing on the allegations in his amended post-conviction petition that (1) he was denied his right to a speedy trial under the four term act; (2) his pretrial identification was improper and denied him due process of law; (3) he was denied due process of law by two competency hearings; (4) he was denied his right to a trial by jury when the trial court instructed defense counsel not to ask certain questions during voir dire examination; and (5) his confession was involuntary.

In the case at bar, all of petitioner's allegations (assuming that each raises a constitutional issue) result from the original trial record. Petitioner's allegation that his confession was involuntary was specifically ruled upon in his direct appeal. Having once had a review of that issue, petitioner cannot now seek to relitigate that issue in post-conviction proceedings. Each of petitioner's other allegations were known from the original trial record, but were not raised in his direct appeal. Petitioner's failure to raise those issues in his direct appeal does not allow him to raise them in post-conviction proceedings.

We have examined the record and concur in the opinion of the public defender that the argument thus raised does not have substantial merit. Our inspection of the record does not disclose any additional possible grounds for an appeal which are also not frivolous. Accordingly, the public defender of Cook County is granted leave to withdraw as counsel and the judgment of the Circuit Court of Cook County is affirmed.

MOTION ALLOWED:
JUDGMENT AFFIRMED.

FIRST DISTRICT - SECOND DIVISION.

LEIGHTON, J., did not participate.

PUBLISH ABSTRACT ONLY.

58743

PEOPLE OF THE STATE OF ILLINOIS,)	
)	
Respondent-Appellee,	)	APPEAL FROM THE CIRCUIT COURT
	)	OF COOK COUNTY.
vs.)	
)	
HENRY A. LAURANT,	)	HONORABLE NATHAN KAPLAN,
	)	Presiding.
Petitioner-Appellant.))	

PER CURIAM:

SUPPLEMENTAL OPINION

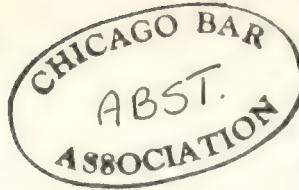


It has come to the attention of this court that Petitioner-Appellant responded to the Public Defender's motion. We have reviewed the response and find no reason to modify our initial opinion and order.

JUDGMENT AFFIRMED.

FIRST DISTRICT - SECOND DIVISION
LEIGHTON, J., did not participate.





NO. 55785

PEOPLE OF THE STATE OF ILLINOIS,	)	APPEAL FROM
	)	CIRCUIT COURT
Plaintiff-Appellee,	)	COOK COUNTY
)	
vs.)	
)	
ROBERT L. BUSH,	)	HONORABLE
	)	RAYMOND G. HALL,
Defendant-Appellant.	)	PRESIDING.

MR. JUSTICE LEIGHTON delivered the opinion of the court:

Defendant was charged with burglary. Before trial, he made a motion to suppress evidence taken from him when he was arrested. The motion was denied. Thereafter, he waived trial by jury, was convicted and sentenced to serve two to six years. In this appeal, he presents two issues. 1. Whether the trial court erred in denying his motion to suppress. 2. Whether he was proven guilty beyond a reasonable doubt.

On May 26, 1970 at about 3:00 A.M., two Chicago police officers, Gerald Cushing and David J. Davidson, were on patrol in a marked police car proceeding westerly on 76th Street. At approximately 1532 West, they saw a humidifier near a lamp post. It was in good condition and did not appear to be abandoned. The officers decided to question some men nearby; so they continued driving west. As they did, they saw defendant walking north on the west side of South Laflin Avenue, carrying a large fan. He crossed 76th Street, toward the officers, in a southwesterly-northeasterly direction. According to one officer, defendant came to " * * * I would say maybe six to eight feet, something like that * * *" from the squad car. The area was illuminated by an overhead street lamp and by the headlights from the car. Officer Cushing later testified that he looked at defendant and saw the butt of a gun sticking about one inch out of his coat pocket. Officer Davidson testified that his partner called out to warn him that defendant had a gun. The two officers left

their vehicle with guns drawn, approached defendant, arrested him, searched him and found on his person a .22 caliber pistol with five rounds of ammunition in it, four or five old fashioned straight razors, a comb, brush, sticks of gum, candy and some change. They placed defendant in the squad car. From a tour of the area, the officers discovered that at 7630 1/2 South Ashland Avenue, a block west and approximately one-half block south of the point that they first saw defendant, a barber shop had been broken into and burglarized. The owner was called; he identified the humidifier, the fan defendant was carrying and the four or five straight razors found in defendant's pockets as his property taken in the burglary.

Defendant was the only witness in support of his motion to suppress. He testified that when Cushing and Davidson arrested him, he was carrying the fan and had the .22 caliber pistol in his pocket. Defendant said, however, that the pistol was not protruding from his pocket as Cushing testified; it was out of sight. Defendant denied he burglarized the barber shop.

To impeach him, the State proved by a certified conviction statement that at the time of his arrest he had been convicted of burglary and was on probation for that crime. To contradict him, the State called Cushing and Davidson. Cushing testified, and was corroborated by Davidson, that before defendant was arrested, he saw the butt of a pistol protruding from his coat pocket. At the conclusion of the hearing, defendant's counsel said to the trial judge, "All I have to say about the case is if you believe that my client, a convicted burglar, walked down the street at three o'clock in the morning with a hot fan under his arm with a pistol butt sticking out of his pocket, then you ought to deny the motion to suppress. On the other hand, if you find the evidence that the police are lying and my client truthful, that he had it stuck in his belt so nobody would see it, then you ought to grant the motion." The court denied the motion.

After hearing the decision, defense counsel requested findings of fact. The trial judge then referred to the .22 caliber pistol and said, "An ordinary .22 pistol might be a little shorter but this pistol, being as long as it is, I find it not hard to believe that this butt can be sticking out of the pocket." He ruled that defendant was arrested because Officer Cushing saw him with the butt of a pistol protruding from his pocket.

Obviously, the trial court accepted Officer Cushing's testimony that he saw the butt of a pistol protruding from defendant's coat pocket. The record supports this acceptance. (People v. Cosby, 118 Ill. App. 2d 169, 255 N.E. 2d 54.) Cushing, then, had probable cause to believe that defendant was committing an offense. (People v. Jones, 31 Ill. 2d 42, 198 N.E. 2d 821; People v. Zazzetti, 6 Ill. App. 3d 858, 286 N.E. 2d 745.) From this fact, he and his partner Davidson, had reasonable grounds to arrest defendant without a warrant. (Ill. Rev. Stat. 1969, ch. 38, par. 107-2(c); People v. McDonald, 26 Ill. 2d 325, 186 N.E. 2d 303.) The arrest was lawful and a search incident to it could be made. (People v. Cox, 49 Ill. 2d 245, 274 N.E. 2d 45; People v. Lawrence, ___ Ill. App. 3d ___, 273 N.E. 2d 637.) Any evidence seized in such a search was admissible. (People v. Davies, 354 Ill. 168, 188 N.E. 337; People v. West, 15 Ill. 2d 171, 154 N.E. 2d 286.) Therefore, the trial court did not err in denying defendant's motion to suppress. People v. Accardi, 58 Ill. App. 2d 364, 208 N.E. 2d 43.

The denial allowed the State to prove that when defendant was arrested he had exclusive possession of property stolen in a recent burglary. But possession was the only evidence against the defendant. As a consequence, he contends the State did not prove beyond a reasonable doubt that he committed burglary as charged in the indictment.

It is settled law that exclusive possession of property recently stolen is prima facie evidence that the possessor committed the larceny. When larceny and burglary are committed at the same time, it will be concluded that the person who committed the larceny also committed the burglary; and whatever goes to show one to be guilty of the larceny equally evidences his guilt of the burglary. Smith v. People, 115 Ill. 17, 21, 3 N.E. 733.

There are some cases in which courts have said that where larceny and burglary are committed at the same time, possession of the stolen property immediately after the theft will warrant conviction for the burglary, unless the fact of possession is overcome by circumstances or other evidence. (Longford v. People, 134 Ill. 444, 25 N.E. 1009; People v. Jefferies, 6 Ill. App. 3d 648, 285 N.E. 2d 592.) There are others in which it is said that exclusive possession of property recently stolen in a burglary is prima facie evidence of guilt by the possessor, unless the possession is explained in a manner that raises a reasonable doubt of guilt. People v. Adamek, 354 Ill. 551, 188 N.E. 743; People v. Mizzano, 360 Ill. 446, 196 N.E. 439; People v. Tolefree, 9 Ill. App. 3d 475, 292 N.E. 2d 452.

In this case, defendant's only explanation of his exclusive possession of property recently stolen in a burglary was his testimony that he purchased the fan he was carrying at the time of his arrest "from a fellow that I had just recently left." That fellow, according to defendant, was a James Stewart whose address he did not know, except that he was " * * * staying at the Gardens * * *, Altgeld Gardens." On cross-examination, however, defendant admitted that at the time of his arrest, he lied to the two policemen concerning the fan when he told them that he had " * * * just picked it up down the block." Stewart, the man he claims sold him the fan, did not have any straight razors, combs, brush from a barber shop or a humidifier like the one found near the place defendant was arrested. Under these circumstances, we do not believe

defendant's testimony explained his possession of recently stolen property in such a manner as to raise a reasonable doubt of his guilt. We believe it more reasonable to conclude, as did the trial judge, that defendant burglarized the barber shop in question and in the burglary stole the property that was found in his possession. The judgment is affirmed.

Affirmed.

Stamos, P.J. and Downing, J., Concur.

Publish abstract only.

57210



PEOPLE OF THE STATE OF ILLINOIS,
on the relation of ROBERT LAZAR,
Plaintiff-Appellee.

vs.

**JAMES B. CONLISK, JR., Superintendent
of Police of the City of Chicago,
DAVID E. STAHL, Comptroller of the
City of Chicago, JOSEPH BERTRAND,
Treasurer of the City of Chicago, and
THE POLICE BOARD OF THE CITY OF CHICAGO,
Defendants-Appellants.**

Appeal from the
Circuit Court of
Cook County,

Honorable
Edward J. Egan,
Judge Presiding.

PER CURIAM:

Robert Lazar (relator) instituted this action in mandamus to compel payment of salary allegedly due him as a police officer of the City of Chicago, which was withheld by defendants for a period during which relator was suspended from the police force. The matter was heard by the trial court on the complaint in mandamus, the answer thereto, and the reply to the answer. The writ of mandamus issued, by which the defendants were commanded to pay to relator the salary to which he was ordinarily entitled for the first thirty days of the suspension (less normal deductions for taxes and the like) and were also commanded to expunge the reference to the first thirty days of the suspension from relator's departmental record. Defendants have appealed, contending that relator is not entitled to his salary for the first thirty days of the suspension since that period of the suspension was valid in that it was ordered by the Superintendent of Police in accordance with the power granted to him under section 10-1-18.1 of the Illinois Municipal Code. (Ill.Rev.Stat. 1971, ch. 24, par. 10-1-18.1.)

It appears from the record that relator was initially suspended on January 23, 1970, by order of the Superintendent of Police; that charges were formally filed against relator before the Police Board of the City of Chicago on April 22, 1970; and that the Police Board thereafter held hearings on the charges and suspended relator

for a period of one year, from April 22, 1970, through April 21, 1971. Relator subsequently filed a demand upon defendants that he be paid his usual salary for the period commencing January 23, 1970 (the date of the Superintendent's suspension) to April 22, 1970 (the date of the Police Board's suspension.)

The record further reveals that relator has been paid for the period from February 22, 1970, to April 22, 1970, and the only question which remains is whether he is entitled to the salary for the period commencing January 23, 1970, and ending February 21, 1970, which are the first thirty days of the suspension. Relator's reply to the defendants' answer to the complaint for mandamus and his brief on this appeal deny that the suspension on January 23, 1970, was ordered pursuant to the Superintendent's power under section 10-1-18.1 of the Code and also deny that it was ordered within the terms of that section of the Code generally. However, relator conceded at the hearing on the pleadings that the Superintendent's January 23rd order of suspension was initially valid when his counsel stated to the trial court that once the first thirty days of the suspension has elapsed, the City could no longer rely upon that order to justify the suspension but was then required to press charges before the Police Board to effect a valid suspension. It is relator's position, nevertheless, that once the first thirty days of the Superintendent's suspension elapsed, the suspension from January 23, 1970, to April 22, 1970, was thereby rendered invalid, entitling him to his salary for that period.

The Statute here involved is section 10-1-18.1 of the Illinois Municipal Code (Ill.Rev.Stat. 1971, ch. 24, par. 10-1-18.1), which in pertinent part reads as follows:

"In any municipality of more than 500,000 population, no officer or employee of the police department in the classified civil service of the municipality whose appointment has become complete may be removed or discharged, or suspended for more than 30 days except for cause upon written charges and after an opportunity to be heard in his own defense by the Police Board.

* * * * *

"Nothing in this Section limits the power of the superintendent to suspend a subordinate for a reasonable period, not exceeding 30 days."

No case has been cited or found bearing on the question of whether a suspension ordered pursuant to the authority granted to the Superintendent of Police by section 10-1-18.1 of the Code is invalidated by the lapse of time beyond the initial thirty days of that suspension prior to formal charges having been filed with the Police Board. Section 10-1-18 and section 10-1-18.1 of the Code are essentially identical in language and import relative to administrative suspensions, discharges and removals. (Ill.Rev.Stat. 1971, ch. 24, pars. 10-1-18, 10-1-18.1.) Section 10-1-18 in fact directly refers to section 10-1-18.1 in several respects, and both sections were enacted by the legislature on the same day. Cases involving the interpretation of the provisions of section 10-1-18 which relate to those provisions of section 10-1-18.1 involved here will therefore be given weight in the interpretation of those provisions of the latter section.

Two cases which deal with the language contained in section 10-1-18 relating to the question presented here are People ex rel. Petlock v. McDonough, 131 Ill.App.2d 469, 268 N.E.2d 267, cited by relator, and Brewton v. Civil Service Commission of the City of Chicago, 115 Ill.App.2d 460, 253 N.E.2d 504, cited by defendants.

In the Petlock case, the plaintiff, a City of Chicago employee in the Department of Streets and Sanitation, was suspended for a period of thirty-nine days, without charges having been made or without the acting commissioner of the department having taken any action on the suspension. The appellate court affirmed the lower court's judgment in the mandamus action, which had ordered payment to plaintiff of thirty-nine days wages (rather than only nine days wages), the appellate court stating that the defendants' failure to proceed against the plaintiff in accordance with the provisions of section 10-1-18 of the Code rendered the suspension illegal. It does not appear in the Petlock case that the plaintiff had been suspended under the "not exceeding 30 days" provision of

the statute, and the appellate court treated the matter as though plaintiff had in fact been suspended under the provision of the statute relating to suspensions of over thirty days. The Petlock case is clearly not applicable to the circumstances at bar, where, as relator has conceded, relator was initially suspended by order of the Superintendent of Police, charges were formally brought, and the Police Board proceeded against him.

In the Brewton case, on the other hand, the plaintiff had been employed as a civil service employee by the Chicago Public Library and had received a suspension from service for good cause, apparently on July 18, 1966. On August 18, 1966, thirty-one days later, charges were filed against plaintiff with the Civil Service Commission for his discharge from service. Plaintiff was discharged and appealed, contesting the jurisdiction of the Commission to act on the charges filed against him, on the grounds that the charges were not filed within the thirty-day suspension period nor was he accorded a hearing within that time. In affirming the lower court's affirmance of the Commission's decision, the Brewton Court stated, at pages 463 and 465:

"Under this statute (section 10-1-18) a municipality may suspend a civil service employee for a reasonable period of time not exceeding thirty days. It cannot suspend him for a greater length of time, remove or discharge him without preferring written charges with the Civil Service Commission. A hearing must then be held to determine if there is just cause for a longer suspension or for the termination of his employment. The statute is designed to protect municipal employees from discharge for political or arbitrary reasons by providing requirements and procedures for their dismissal.

* * * * *

"Permitting the filing of charges for dismissal after expiration of a thirty-day suspension rather than during the suspension results in no great prejudice

to an employee; he loses no right of review and loses no pay for he is entitled to compensation from the time his suspension ends until the time he is discharged. We thus sustain the plaintiff's alternative contention that he should be paid for the period between the termination of his suspension and the date of his discharge by the commission. (Emphasis added.) The plaintiff remained an employee of the library during his suspension. When his suspension ended he was still an employee and was entitled to reinstatement to active duty. If it were otherwise it would result in his being suspended without pay for more than the permitted thirty days. (Emphasis added.)..."

While the question in Brewton did not involve the validity of the suspension where more than thirty days elapsed between its inception and the filing of charges before the Commission, there is no question that plaintiff there was not entitled to his salary for those first thirty days. The Brewton case applies to the instant facts. Relator here received an initial thirty-day suspension by the Superintendent of Police and he was subsequently officially charged and suspended by the Police Board for the period of one year. The order of the Superintendent of Police suspending relator in the instant case was therefore initially valid, and its validity was not effected simply by the passage of time under these circumstances. The record reveals that relator failed to otherwise demonstrate that the Superintendent's order was invalid, such as having been entered beyond his authority, having been entered capriciously, or the like, so as to have entitled relator to his salary for the first thirty days of the suspension. Since it was not demonstrated that the initial suspension order of the Superintendent of Police was invalid, relator is not entitled to his salary for the first thirty-day period.

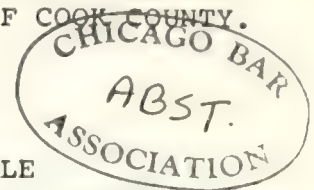
For the foregoing reasons, the judgment of the Circuit Court of Cook is reversed.

JUDGMENT REVERSED.

THIRD DIVISION: Justice McGlooin did not participate.

57640

PEOPLE OF THE STATE OF ILLINOIS,	)	APPEAL FROM CIRCUIT
	)	COURT OF COOK COUNTY.
Respondent-Appellee,)	
)	
v.)	
)	
HENRY BARNES,	)	HONORABLE
	)	REGINALD J. HOLZER,
Petitioner-Appellant.)	)	PRESIDING.



PER CURIAM* (FIFTH DIVISION, FIRST DISTRICT):

Henry Barnes, petitioner, appeals from the dismissal of his pro se post-conviction petition filed pursuant to the Illinois Post-Conviction Hearing Act (Ill. Rev. Stat. 1971, ch. 38, par. 122-1, et seq.).

The issue on appeal is whether petitioner was denied his right to effective assistance of counsel in the post-conviction proceedings.

Petitioner had been charged with burglary, rape and aggravated battery. After a jury trial, he was found guilty of aggravated battery and sentenced to seven to ten years. His conviction was affirmed in People v. Barnes (1969), 118 Ill. App.2d 128, 255 N.E. 2d 18. Petition for Leave to Appeal denied 42 Ill.2d 586. On July 16, 1970, petitioner filed a pro se post-conviction petition. A public defender was appointed to represent petitioner. On June 23, 1971, a hearing was held on the State's motion to dismiss the petition. At the hearing three issues were discussed, namely, violation of the Four Term Act, improper identification and the State's failure to prove defendant guilty beyond a reasonable doubt. The public defender pointed out that the first two issues were raised in defendant's direct appeal.

As to the third point, the public defender stated: "As the court is aware a reasonable doubt argument is not a constitutional question"; that issue was also decided by the appellate court in People v. Barnes, 118 Ill. App.2d 128, 130. The public defender advised the court as follows:

* Justice Sullivan did not participate.

"* * * In my interview with Mr. Barnes I explained to him that these were issues that were either decided by the Appellate Court or, if they were not decided by the Appellate Court, were not of a constitutional magnitude and therefore would not warrant a post conviction petition let alone a post conviction hearing. So we will stand on the petition as it was pro se filed with the statement that I have just made as to the three issues that were raised. After reading the abstracts and the transcripts, in the interview I found there were no other issues I could bring up and that's why I would stand on the pro se petition itself."

The assistant state's attorney then made an oral motion to dismiss the petition advancing substantially the same reasons as the public defender.

On appeal the petitioner argues that the requirements of Anders v. California, 386 U.S. 738, 18 L.Ed.2d 493, 87 S.Ct. 1396, should apply at a post-conviction hearing in the trial court; that since a defendant at a post-conviction hearing is no less deserving of an active advocate of his cause than is a defendant on direct appeal, the defendant here should have been given notice of the fact that defense counsel would contend at the post-conviction hearing that the defendant's case was without merit, and defendant Barnes should have then been allowed to raise any points he chose.

In other words, it is the contention of petitioner that the requirements set forth in the Anders case in a first appeal should apply to a hearing in the trial court on a pro se post-conviction petition where counsel for the petitioner is of the opinion that the petition is wholly frivolous and that counsel should so inform the petitioner so that the petitioner could "raise any points that he chose."

In People v. Cleveland Dorsey, No. 43315, the Illinois Supreme Court on May 18, 1971, issued an unpublished order affirming the circuit court of Cook County in its dismissal of a pro se post-conviction petition. In Dorsey appointed counsel filed a motion for leave to withdraw in the trial court on the ground that the post-conviction petition failed to show any deprivation of peti-

tioner's constitutional rights. The State filed a motion to dismiss the petition. The trial court allowed both the State's motion to dismiss and the trial counsel's motion to withdraw. In affirming, the Supreme Court said:

"Anders applies only to cases on appeal, and not to trial court proceedings. A post conviction petitioner is entitled to the services of counsel and counsel should not be granted leave to withdraw prior to disposition of the proceeding. In spite of the fact that an Anders motion is inappropriate in trial court proceedings, we find no prejudicial error here. Counsel stated at the hearing that he had corresponded with defendant and that defendant had filled out a questionnaire and returned it to him. Counsel also stated that he had read the transcript. He then presented the claims of defendant and stated that in his opinion these allegations did not justify post conviction relief. While an attorney should be an advocate for his client, he is not obligated to urge frivolous points which are contrary to the law and the facts."

In People v. Townsel, ____ Ill. App.3d ____, ____ N.E.2d ____, (Appellate Court No. 57110, filed July 31, 1973) petitioner appealed the denial of his pro se post-conviction petition without an evidentiary hearing. At the hearing in the trial court counsel for the petitioner stated that he had read the report of proceedings, examined the pro se post-conviction petition, had a personal interview with petitioner and had in his possession a questionnaire filled out by the petitioner. He stated that no point in the pro se petition raised a constitutional question. On appeal petitioner argued that under Anders, counsel's failure to notify petitioner in advance of his intended action denied the petitioner the opportunity to contest counsel's conclusion that the pro se post-conviction petition was without merit. Petitioner also argued that he had no one advocating his cause in the trial court. After noting that Anders applies only to cases on appeal, the court rejected petitioner's contentions, saying:

"In Supreme Court Rule 651, our Court has established requirements of advocacy for counsel appointed to represent a post-conviction petitioner, and there is no provision for advance notification by counsel to petitioner, should



counsel decide to exercise his Dorsey right to communicate his conclusion to the trial court after having argued petitioner's contentions to the court at the hearing on the State's motion to dismiss. In the instant case, not only did counsel fulfill all the advocacy requirements of Rule 651, but, in addition, he argued all of petitioner's contentions to the trial court before first communicating his conclusion to the court.

"We conclude that petitioner's constitutional right to an advocate in respect of his post-conviction petition at the trial level was not violated. Basically, his constitutional right is to have his position presented and argued to the court by an advocate, and that right was fulfilled.

"We are satisfied petitioner's appointed counsel, in the post-conviction proceeding before the trial court, discharged his responsibility as an advocate, in accordance with the standards of ethical conduct prescribed in the Illinois Code of Professional Responsibility (adopted May 1, 1970 by the Illinois State Bar Association and Chicago Bar Association)."

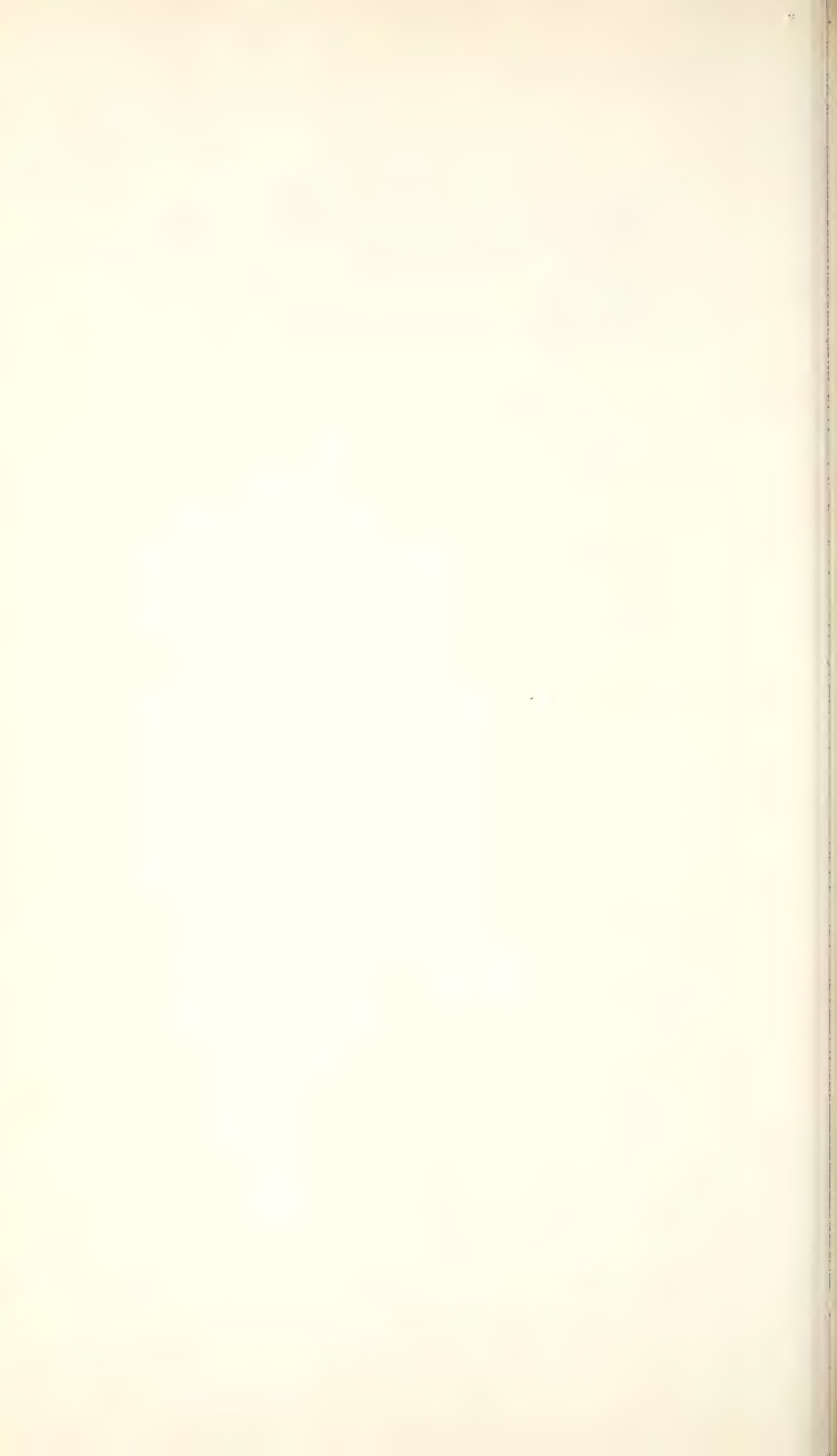
In the case at bar the public defender had a personal interview with the petitioner explaining that there were no issues to raise, he read the transcript of proceedings, the brief and abstract and opinion of the appellate court and presented the issues raised in the pro se post-conviction petition to the trial court. This procedure satisfied the requirements of Illinois Supreme Court Rule 651(c) and People v. Slaughter, 39 Ill.2d 278, 235 N.E.2d 566, and does not conflict with the guidelines set forth in the Anders case.

The Anders case applies only to cases on appeal. While an attorney should be an advocate for his client, he is not obliged to urge frivolous points which are contrary to the law and the facts. People v. Stovall, 47 Ill.2d 42, 264 N.E.2d 174, People v. Anthony, 5 Ill. App.3d 722, 284 N.E.2d 46. The petitioner was not denied effective assistance of counsel in the post-conviction proceedings.

The judgment of the circuit court of Cook County is affirmed.

AFFIRMED.

Abstract only.



58563, 58564



PEOPLE OF THE STATE OF ILLINOIS,	)	Appeal from the
Plaintiff-Appellee,	)	Circuit Court of
	)	Cook County
v .)	
	)	Honorable
LARRY CHALMERS,	)	Earl E. Strayhorn,
Defendant-Appellant.	)	Presiding.

PER CURIAM* (FIFTH DIVISION, FIRST DISTRICT):

Defendant entered pleas of guilty on March 18, 1971, to two indictments charging him with separate offenses of armed robbery, Ill. Rev. Stat. 1969, ch. 38, par. 18-2, and was sentenced to probation for five years on each charge, the terms to run concurrently. Following a hearing on a rule to show cause why his probation should not be terminated, defendant's probation was revoked and he was sentenced to concurrent terms of 12 to 20 years.

Defendant appeals from the orders of revocation, contending that the trial court improperly allowed into evidence statements made by him upon his arrest without proof that he was advised of his constitutional rights pursuant to Miranda v. Arizona, 384 U.S. 436; that the court erred in revoking his probation upon grounds which were not set forth in the petition filed in support of the rule to show cause; that the evidence adduced by the State, relating to the armed robbery allegedly committed subsequent to his admission to probation and for which his probation was revoked, was insufficient; that the sentences are excessive; and that he should be credited with time served on probation against the sentences imposed upon the revocation of that probation.

At the hearing on the rule to show cause, Christine Lussie testified that at about 8:45 or 9:00 P.M. on January 2, 1972, she was approaching alone the vestibule of a six-flat apartment building located at 6107 South Kenwood Avenue

*Mr. JUSTICE ENGLISH did not participate.

in Chicago where she was to attend a party; she observed a person, whom she identified at the hearing as the defendant, and another man walking toward her on the sidewalk. They followed her into the vestibule, where she rang the doorbell for entrance into the apartment area. She and the two men were followed into the vestibule by three or four other men. The vestibule was lighted with "a bright naked bulb overhead." The witness testified that one of the men asked her where she was going (she was not certain which one), that she replied that she was going to a party and that she did not think that they would be able to attend. As she proceeded up several stairs to a door three of the men followed her and began going through her pockets, one of them saying, "Well, let's see what you have got." The defendant and another man went through her wallet, removed two gasoline filling station credit cards, which they kept, and took a set of keys. About halfway through the course of the incident, the defendant produced a gun and held it "close to" Miss Lussie's face. That gun was the only one the witness saw during the incident. When someone was heard coming on the other side of the door and when Miss Lussie pounded on the door, all the assailants left. The incident was reported to the police. Subsequently, possibly on May 4, 1972, the witness responded to a call from the police and attended a line-up at which she identified the defendant. She testified that after the robbery she had received billings from the gasoline company for purchases with the stolen credit cards, which purchases she had not made, the billings showing the license plate number of a vehicle unknown to her.

Miss Lussie testified on cross-examination that "normal" street lighting existed outside the building on the night of the robbery and that a church next door had lighted a "huge big neon sign." When she first observed the defendant and the other man approaching on the sidewalk, she was unable to distinguish their faces and could not recall whether one of them was wearing facial hair, but she did recall the clothing they were wearing. She



testified that she and her assailants remained in the vestibule about five minutes. Although she was pushed against the door and her pockets were gone through, she was not threatened by the defendant nor hit nor pushed by him, but she was "slightly scared, it was six of them and one of me." The assailants stood between her and the front door and kept her from ringing the bell again. The witness was unable to describe the "other three fellows" because she was watching "the ones who was closest to me." She looked at "stacks" of police photographs but she was unable to make any positive identification of the defendant from them. The witness was not certain whether the defendant or one of the other men took her credit cards and keys.

Police Officer William Wagner testified that his investigation of the robbery disclosed the existence of a vehicle belonging to one Stanley Hagler and that the defendant stated to the officer that he was using Hagler's automobile while the latter was in the County Jail. Wagner testified generally that prior to taking the defendant's statement he advised him of his constitutional rights. Upon objection by defendant relative to Miranda warnings, the court interposed the comment that "[t]his is a violation, not on the question of guilt or innocence."

On cross-examination Officer Wagner was asked what warnings were given to the defendant and the officer responded:

"I told him that he had a right to remain silent, that before doing any questioning he had a right to have a lawyer present; that anything he says or writes, should or would be held against him in a court, and if he could not afford a lawyer, that one would be appointed.

Then I asked him if he understood those rights."

Wagner further testified that he had received a description of the assailant but that he did not recall anything having been said concerning a moustache allegedly worn by the defendant. He testified that the victim of the robbery viewed the line-up twice because she wished to be certain of her identification of the defendant. Wagner testified that he did not tell the victim that

one of the men in the line-up was a suspect in the robbery.

Mel Williams, probation officer, testified as to the defendant's poor record in making reports to the officer and as to the arrest of the defendant on March 2nd on a robbery charge.

Defendant testified that he had worn a goatee or a moustache for three or four years, that he wore one on January 2, 1972, and that he also wore one on the date of the line-up.

In finding that there were grounds for revocation of the defendant's probation, the trial court specifically stated that he believed Miss Lussie. The court noted that when he placed the defendant on probation it was on the condition that he neither possess, nor be in the company of those who possessed or owned, a gun. The court also stated that the defendant's record indicated "another violation" of probation, that of failing to report to his probation officer. Defendant's probation as to both indictments to which he had pleaded guilty was thereupon terminated.

OPINION:

Defendant's first contention concerns the use of his statements without having been advised pursuant to Miranda. The State initially agreed with defendant that a defendant must be properly warned of his constitutional rights before any statement may be admitted into evidence at a hearing on a rule to show cause. (See e.g., People v. Potter, 85 Ill.App.2d 151, 228 N.E.2d 238.) Defendant goes on to argue however that the warnings he received were inadequate and that he did not knowingly and understandingly waive his rights. In People v. Bosveld, 109 Ill.App.2d 317, 321, 248 N.E.2d 697, the court upheld a conviction where the warnings given were almost identical to those given in the instant case. Thus, although such warnings could be more specific, we cannot say that they were inadequate.

The statements made by the defendant upon his arrest related solely to his use and operation of the Hagler automobile while

Hagler was in jail. The trial court specifically stated that he believed Miss Lussie's testimony relating to defendant's robbery of her, which testimony in no way related to defendant's use of the Hagler automobile. The statements given by the defendant were not essential to the court's finding of his violation of probation, and the admission of such statements into evidence at the hearing, if error, was harmless.

Defendant's second contention is that the trial court noted upon the finding of a violation of probation that the defendant's record while on probation also showed "another violation" of his probation, namely, that of his poor record in reporting to the probation officer. Defendant argues that he was thereby found in violation of a condition of probation of which he was not served with notice in the rule to show cause and against which he would have to defend.

The record shows that the court's primary ruling on the violation concerned the robbery of Miss Lussie, and that the second comment of the court relating to the poor record of reporting to the probation officer was an aside and an afterthought on the court's part; no objection was raised thereto. The petition filed in support of the rule to show cause shows that it was the Lussie robbery which was to serve as the basis of the rule, which the testimony at the hearing bears out.

Defendant next contends that the State failed to prove him guilty of the armed robbery of Christine Lussie by sufficient evidence. A violation of probation need be proven only by a preponderance of the evidence. (People v. Crowell, 53 Ill.2d 447, 292 N.E.2d 721.) Defendant's challenge to the State's evidence relates mainly to Miss Lussie's inability to distinguish the identities of the two men whom she saw on the sidewalk in front of the apartment building and who later followed her into the building, and to her inability to recall whether the defendant was wearing a moustache on the night of the robbery. Miss Lussie's testimony of what had occurred during the robbery itself was clear, her



identification of the defendant at trial was unshaken on cross-examination, and her identification of him at the line-up was certain. The fact that Miss Lussie wished to observe the line-up a second time so that she could be absolutely certain of her identification of the defendant does not necessarily reflect upon the certainty of her identification. The defendant was one of two men who went through and removed property from Miss Lussie's person and possession; he held a gun to her face about halfway through the incident; and the robbery took place in a brightly lighted area, where the victim viewed her assailants for about five minutes. Although Miss Lussie could not recall whether the defendant wore facial hair at the time of the robbery, that fact alone does not raise a reasonable doubt as to her testimony, but goes only to the weight to be accorded her testimony. (People v. Calhoun, 132 Ill.App.2d 665, 668, 270 N.E.2d 450.) The trial court specifically found Miss Lussie's testimony to have been credible. Defendant's armed participation in the robbery of Miss Lussie was proven by a preponderance of the evidence.

Defendant finally argues that the sentence imposed upon him is excessive and that he should be given credit against whatever sentence is ultimately imposed for the time which he has spent on probation.

The supplemental record in both cases indicates that the trial court, upon the defendant's pleas of guilty to the original charges, was initially inclined to sentence defendant on each charge to terms of two years to four years in the penitentiary, as was recommended by the State. Defense counsel objected to the proposed terms on the ground that probation had been promised at a conference on the negotiated plea. The trial court later admitted it was in error and the defendant was placed on probation for concurrent terms.

The minimum term of years for which an offender could have been sentenced under the statute in force and effect at the time

defendant committed the instant armed robberies was two years and the maximum was any number in excess thereof. Ill. Rev. Stat. 1969, ch. 38, par. 18-2. Currently, armed robbery is a Class 1 felony, the minimum term of sentence for which is four years (unless the court, under the circumstances, determines a lengthier minimum sentence is warranted) and the maximum term for which is any number of years in excess thereof. Ill. Rev. Stat. 1972 Supp., ch. 38, par. 18-2, 1005-8-1.

Upon revocation of his probation, the court sentenced defendant to concurrent terms of twelve years to twenty years, a sentence quite disparate from the one originally proposed by the assistant state's attorney and accepted by the court. At the time of probation the defendant was twenty-one years of age and had no prior convictions, a twelfth grade education, and a spotty work record. Other than the Lussie armed robbery and defendant's apparent use of the credit cards subsequent thereto, nothing appears in the record which could account for the court's change of attitude which so drastically increased the penalties. While the record shows that the defendant was involved in three separate armed robberies (the armed robberies to which he pleaded guilty and the Lussie armed robbery, the latter of which may be considered only with regard to his rehabilitation potential), it would appear that the minimum sentence imposed by the court exceeds the constitutional requirement that a sentence be proportionate with the nature of the offense and with the possibilities of rehabilitation. People v. Cooke, 117 Ill.App.2d 296, 300, 254 N.E.2d 293.

The minimum sentences imposed upon the defendant herein are excessive, and in light of the fact that the instant pleas of guilty were entered to two indictments, charging defendant with a single armed robbery and a double armed robbery, the minimum sentences are reduced to six years. The maximum term will remain as imposed so that the parole board may be allowed adequate leeway to determine the rehabilitation potential of the defendant.

Finally, as to the question of defendant's being afforded credit for the term served on probation, subsection (h) of section 1005-6-4 of the Unified Code of Corrections provides:

"Resentencing after revocation of probation or of conditional discharge shall be under Article 4 *** Time served on probation or conditional discharge shall be credited against a sentence of imprisonment or periodic imprisonment."

Section 1008-2-4 of that Code provides:

"Prosecution for any violation of law occurring prior to the effective date of this Act is not affected or abated by this Act. If the offense being prosecuted has not reached the sentencing stage or a final adjudication, then for purposes of sentencing the sentences under this Act apply if they are less than under the prior law upon which the prosecution was commenced."

(See Ill. Rev. Stat. 1972 Supp., ch. 38, pars. 1005-6-4(h) & 1008-2-4.) Section 117-3 of the Criminal Code, pursuant to which defendant's probation was revoked, contained no similar provision for credit of time, and hence the new Code of Corrections must be said to work a benefit to defendant in terms of sentencing.

Ill. Rev. Stat. 1971, ch. 38, par. 117-3.

By the express terms of subsection (h) of section 1005-6-4 of the new Code, defendant is entitled to credit against whatever sentence is imposed by the trial court for the time which he served on probation, from the date of his pleas of guilty on March 18, 1971, to September 7, 1972, when his probation was revoked. The State's argument that the time served on probation is "inconsequential in light of the sentence imposed" and that the terms of the case of People v. Chupich, 53 Ill.2d 572, 295 N.E.2d 1, should not be expanded beyond its holding, ignores the express dictate in the new Code providing for such credit. That argument does not answer the defendant's position in this regard. In accord, People v. Murray, Fourth District, No. 12163, September 10, 1973.

58563, 58564

We reduce the minimum sentences imposed to six years less time to be credited for the period of time which the defendant spent on probation. In all other respects we affirm the judgments.

Affirmed as modified.



14 I.A.³ 995
Oct 9/73

NO. 55925

PEOPLE OF THE STATE OF ILLINOIS,	)	APPEAL FROM
	)	CIRCUIT COURT
Plaintiff-Appellee,	)	COOK COUNTY
)	
vs.)	
)	
LONNIE KING,	)	HONORABLE
	)	KENNETH E. WILSON,
Defendant-Appellant.	)	PRESIDING.

MR. JUSTICE LEIGHTON delivered the opinion of the court:

Defendant, Lonnie King, appeals from a conviction for aggravated battery. The prosecution was by a six-count indictment that charged him, Steven Smith and Charlie "Stone" Smith with attempt murder and aggravated battery on two persons, Ronald Vandergrift and Gregory Sanders. Defendant and Steven Smith went to trial before the same jury and were acquitted of all charges except aggravated battery on Ronald Vandergrift. Post-trial motions were overruled, and the trial court sentenced defendant to serve a term in the penitentiary. Thereafter, claiming he had substantial constitutional questions to present, defendant took a direct appeal to the Supreme Court. However, on motion of the Attorney General, that court transferred the appeal to us for disposition.

Smith was sentenced, and in a separate appeal, his case came to this court for review. We have filed an accompanying opinion affirming his conviction. See People v. Smith, ___ Ill. App. 3d ___, ___ N.E. 2d (No. 56861).

The record discloses that on May 7, 1969, between 1:30 and 2:00 A.M., Ronald Vandergrift, Gregory Sanders and Felix Murry, members of a street gang known as the "Supreme Gangsters" were in the Shrimp Shop, 817 West 69th Street in Chicago. When Vandergrift walked out, he met defendant, Steven Smith and Charlie "Stone" Smith. Vandergrift knew defendant, having seen him many times prior to May 7. He had seen Steven Smith once before. He knew that defendant and his companions were members

of the "Double Six Kings," a street gang that was party affiliated with the Blackstone Rangers.

As defendant and Vandergrift walked from the Shrimp Shop, east on West 69th Street, they engaged in a conversation. Defendant told Vandergrift that he did not belong in that "hood," meaning that neighborhood; that the "Stones" (meaning the Blackstone Rangers) ran that area and that Vandergrift and his friends did not belong there. The conversation continued until they reached the southwest corner of West 69th Street and Halsted Avenue. There, Steven Smith, with Charlie "Stone" Smith nearby, joined defendant and Vandergrift, entered the conversation and told the latter that the "Stones" ran that area "* * *" and that [Vandergrift and his companions] had better not come over in that neighborhood." As soon as Steven Smith said this, according to Vandergrift and Sanders, he pulled out a .38 or .32 caliber pistol, fired twice, wounding Vandergrift in the groin, the bullet lodging in the outer part of his left thigh where it was at the time of defendant's trial.

After the first shots, Vandergrift, Sanders and Murry fled across the street. Vandergrift reached the other side but fell between two cars. He called for help and Murry returned, picked him up and took him to the house of Larry Hoover, 68th and Green Street. According to Sanders, Steven Smith, defendant and Charlie Smith were on the other side of the street; and after the first shots, they ran after him and Vandergrift. More shots were fired. A short time later, defendant, Steven Smith and Charlie Smith turned and fled, going west. The police were called; Vandergrift and Sanders were taken to a hospital where Sanders learned that he had been grazed by a bullet.

Vandergrift was hospitalized three or four days, and after his release, he attended a "reconciliation" meeting at the Blackstone Rangers' headquarters attended by defendant, Steven Smith, Charlie Smith and the main leaders of the Rangers. In

a conversation with defendant, Charlie Smith and the Rangers' chief, in the presence of Steven Smith, Vandergrift was told that the shooting of May 7 was an accident. " * * * because they didn't know that we were with the Stones at the time."

A few days later, Vandergrift again saw defendant, Steven Smith and Charlie Smith. They were seated in the rear of a police car parked outside a poolroom. The officers asked Vandergrift if the three in the car were the persons who shot him.

Vandergrift said they were but he told the policemen that "I did not want to prosecute because they said it was an accident, and also because we were in the same organization at the time."

A short time later, Vandergrift's street gang split from the Blackstone Rangers. He decided to prosecute defendant, Steven Smith and Charlie Smith for the May 7 shooting. A month or so after the shooting incident, Vandergrift himself was taken into custody on two charges of aggravated battery, a marijuana charge and a charge involving bail jumping. He entered into discussions with prosecution authorities concerning his getting leniency if he would testify against the persons who had shot him. When Vandergrift testified, he told the jury that although he expected to be punished for the crimes he had committed, "I expect to get help on my charges by testifying."

After Vandergrift and Sanders had testified, the State called Charles Hoover, who lived in the house to which Vandergrift had been carried after he was shot on May 7. Hoover told the jury that on May 9, 1969, at about 4:00 P.M., he saw defendant at 68th and Halsted. Defendant said to him, "Tell Ronald Vandergrift that we were sorry that we shot him. We didn't know you was Stones [sic]." Hoover said he assured defendant that he was going to deliver the message. Hoover then recounted that the next time he saw defendant was on May 11, at the "reconciliation" meeting concerning which Vandergrift had testified. According to Hoover, among those present were defendant,

Steven Smith and Charlie Smith. Hoover's testimony closed the State's proof of the case. Neither defendant nor Steven Smith testified; no evidence was offered by the defense. The sole issue in this appeal is whether the State proved beyond a reasonable doubt that defendant was legally accountable for the conduct of Steven Smith.

It is obvious from the State's evidence that defendant did not shoot Ronald Vandergrift. On the contrary, the State proved that Vandergrift was shot by Steven Smith. It is the State's theory, however, that under the circumstances shown by its evidence, defendant was legally accountable for Steven Smith's conduct. It relies on the rule that "[a] person is legally accountable for the conduct of another when * * * either before or during the commission of an offense, and with the intent to promote or facilitate such commission, he solicits, aids, abets, agrees or attempts to aid, such other person in the planning or commission of the offense." (Ill. Rev. Stat. 1967, ch. 38, par. 5-2(c).) The State supports application of this rule by pointing to the testimony of its witnesses proving that between 1:30 and 2:00 A.M. on May 7, 1969, at or near West 69th and Halsted Streets in Chicago, defendant, in the company of Steven Smith, engaged Ronald Vandergrift in an argument, was present but did not object to Smith's shooting of Vandergrift, fled with Smith, and later admitted taking part in the shooting and then participated in meetings characterized as "reconciliation" efforts to placate the injured persons and ameliorate gang antagonisms.

Defendant meets the State's contention with the argument that it failed to prove he committed a single act by which he encouraged, advised, aided or abetted the shooting of Vandergrift by Smith. He argues that the concept of aiding and abetting is affirmative in character. He insists that his presence at the scene of the crime, or his negative acquiescence in Smith's conduct, will not furnish the basis for criminal responsibility



on his part. Therefore, defendant insists that his conviction for aggravated battery on the theory of accountability must be reversed.

It is a settled principle of our law that proof of a common criminal purpose can be drawn from circumstances that surround the commission of an act by a group. (People v. Rybka, 16 Ill. 2d 394, 158 N.E. 2d 17; People v. Clark, 30 Ill. 2d 67, 195 N.E. 2d 157.) The fact that a criminal act is not part of a preconceived plan is not a defense if the evidence indicates the accused's involvement in the spontaneous act of the group. (People v. Richardson, 32 Ill. 2d 472, 207 N.E. 2d 478.) "While mere presence or negative acquiescence is not enough to constitute a person a principal, one may aid and abet without actively participating in the overt act and if the proof shows that a person was present at the crime without disapproving or opposing it, it is competent for the trier of fact to consider this conduct in connection with other circumstances and thereby reach a conclusion that such person assented to the commission of the crime, lent to it his countenance and approval and was thereby aiding and abetting the crime." People v. Washington, 26 Ill. 2d 206, 186 N.E. 2d 259; People v. Thicksten, 14 Ill. 2d 132, 150 N.E. 2d 813.

The State proved, without contradiction, that during the early morning hours of May 7, 1969, defendant, aided and assisted by Steven Smith, engaged Ronald Vandergrift in a conversation and led that conversation to an argument during which he told Vandergrift that he should not be in the neighborhood of West 69th and Halsted Streets in Chicago. The subject of the argument was the jurisdiction of rival street gangs. It was proved by the State that defendant, in the argument, manifested a common purpose with Steven Smith and Charles "Stone" Smith when he told Vandergrift, "As a matter of fact, there are Stones all around you. Stones to the right of you, Stones to the left

of you, Stones in front of you and Stones in the back of you." A moment later, according to two eye-witnesses, Steven Smith took a gun from his pocket, shot and wounded Vandergrift. A later shot grazed Sanders. Defendant remained in Smith's company, ran after Vandergrift and his companions, fled the scene of the crime with the perpetrator and two days later told Charles Hoover to "[t]ell Ronald Vandergrift that we were sorry that we shot him." In our judgment, this evidence proved beyond a reasonable doubt that defendant assented to the commission of the criminal act by Steven Smith, lent his countenance and approval to it and thereby aided and abetted the crime. (People v. Hill, 39 Ill. 2d 125, 233 N.E. 2d 367; People v. Pahl, 124 Ill. App. 2d 177, 260 N.E. 2d 405.) We conclude that the State's evidence proved beyond a reasonable doubt that defendant was legally accountable for the conduct of Steven Smith. See People v. Bracken, 68 Ill. App. 466, 216 N.E. 2d 176; People v. Smith, 8 Ill. App. 3d 270, 290 N.E. 2d 261.

Although we have resolved the issues which defendant has presented, we notice that on January 1, 1973, while this appeal was under submission in this court, the Unified Code of Corrections became law. See Ill. Rev. Stat. 1972 Supp., ch. 38, pars. 1001-1-1 to 1008-6-1. The Code, in part, provides that "[i]f the offense being prosecuted has not reached the sentencing stage or a final adjudication, then for purpose of sentencing the sentences under this Act apply if they are less than under the prior law upon which the prosecution was commenced." (Ill. Rev. Stat. 1972 Supp., ch. 38, par. 1008-2-4.) This provision applies to cases pending on direct appeal at the time the Code became effective. (People v. Chupich, 53 Ill. 2d 572, 295 N.E. 2d 1; People v. Dalton, ___ Ill. App. 3d ___, ___ N.E. 2d ___ (No. 55828).)

Under the Code, aggravated battery, the offense for which defendant was convicted, is a Class 3 felony. The Code provides that the sentence for a felony in Class 3 shall be indeterminate

and for any term in excess of one year not exceeding ten years. (Ill. Rev. Stat. 1972 Supp., ch. 38, par. 1005-8-1(b)(4).) It is further provided that " * * * for a Class 3 felony, the minimum term shall be 1 year unless the court, having regard to the nature and circumstances of the offense and the history and character of the defendant sets a higher minimum term, which shall not be greater than one-third of the maximum term set in that case by the court * * *." (Ill. Rev. Stat. 1972 Supp., ch. 38, par. 1005-8-1(c)(4).) Defendant was sentenced to serve not less than 2 nor more than 5 years. Obviously, the minimum of this sentence violates the "one to three" formula of the Code.

Defendant has not raised any issue concerning the conformance of his sentence to the provisions of the Unified Code of Corrections. We attribute this failure to the pendency of this appeal and the filing of defendant's brief before the Code became law. Therefore, in the interest of fundamental justice, we notice defendant's entitlement to modification of his sentence so that its minimum " * * * shall not be greater than one-third of the maximum term set in that case by the court * * *." (Ill. Rev. Stat., 1972 Supp., ch. 38, par. 1005-8-1(c)(4).) Accordingly, we modify defendant's sentence from 2 to 5 to not less than 1 year and 8 months nor more than 5 years for aggravated battery, the offense of which he was convicted.

The conviction and sentence as modified are affirmed and the cause is remanded to the circuit court of Cook County with directions that the mittimus, modified as provided herein, issue in conformance with this opinion. People v. Caritinos, 9 Ill. App. 3d 782, 292 N.E. 2d 899.

Affirmed, sentence modified and cause
remanded with directions.

Drucker, J. and Hayes, J., Concur.

Publish abstract only.



57952

PEOPLE OF THE STATE OF ILLINOIS,)	
)	
Plaintiff-Appellee,	)	APPEAL FROM THE
)	
vs.	)	CIRCUIT COURT OF
)	
ALLEN SANDERS,	)	COOK COUNTY.
)	
Defendant-Appellant.	)	Hon. Robert Downing,
	)	Presiding.
)	
IN THE MATTER OF THE PETITION OF)	
CHESTER A. LIZAK AND WARREN L.)	
SWANSON FOR ATTORNEYS' FEES.)	

MR. JUSTICE ADESKO delivered the opinion of the court:

On February 25, 1969, Chester A. Lizak and Warren L. Swanson were appointed by the Circuit Court of Cook County to represent Allen Sanders, an indigent defendant accused of murder. Lizak and Swanson represented defendant Sanders through the trial until the filing of the Notice of Appeal. A petition for attorneys' fees was filed and the trial court approved a fee of \$250.00 plus \$50.00 for expenses, or a total of \$300.00. Lizak and Swanson appeal, contending that they are entitled to a higher fee.

This case involves the interpretation of Section 113-3 (c) of the Code of Criminal Procedure. This section provides that when a court-appointed attorney files a verified statement of the services he has rendered:

the court shall order ***a reasonable feenot to exceed***\$250 in felony cases ***except that, in extraordinary circumstances, payment in excess of the limits herein stated may be made if the trial court certifies that such payment is necessary to provide fair compensation for protracted representation, and the amount in excess is approved by the Chief Judge of the Circuit. ***" (Ill. Rev. Stat. 1971, ch. 38, par. 113-3 (c)).

Lizak and Swanson state in their petition that a total of 267 court hours and 197 out of court hours were spent by them in this case. They argue that the representation of defendant

Sanders was therefore protracted.

Subsection (c) of section 113-3 provides for the compensation of court appointed attorneys. Prior to 1967, subsections (c) and (d) provided for a fixed maximum fee in criminal cases. These subsections were amended after the decision in People ex rel. Conn. v. Randolph, 35 Ill. 2d 24, 219 N.E. 2d 337, to allow fees of \$150.00 in misdemeanor cases and \$250.00 in felony cases with the provision for payment in excess of these limits upon a determination of the trial court that the protracted circumstances of the case required such payment.

This court in People v. Sims, 131 Ill. App. 2d 327, 266 N.E. 2d 536, considered section 113-3 (c) to determine what would constitute protracted representation or extraordinary circumstances to justify payment in excess of the \$250.00 maximum in a felony case. In that case, also a murder case, the court noted that even though the seriousness of the charge, the knowledge, skill and judgment exercised by counsel are to be taken into account, that the defense of that case was not extraordinary or protracted considered in light of other cases in which a defendant was charged with murder. They found factors involved in that defense to be those envisioned by the legislature when it established the \$250.00 limitation.

The order of the trial court in the instant case took note of the decisions mentioned above, but did not find the instant case to be a protracted case involving extraordinary circumstances. We agree with the order of the trial court. We are not aware of any issue raised by counsel before the trial court or in their brief before this court which point out issues or circumstances which are extraordinary in a case charging murder. The trial of the case, in our opinion, was not unduly protracted so as to be such a case where the legislature contemplated payment

of fees in excess of limitation. Further, the letter of the Chicago Bar Association which notified Lizak and Swanson of their appointment specifically stated that the fee would be limited to a maximum of \$250.00. The trial court noted that petitioners accepted this appointment subject to the provisions of the statute and this letter of appointment and also that the trial court had received no request for special consideration regarding the fee until after defendant's trial. We cannot say that the trial court erred in refusing to order the payment of attorneys' fees in excess of the amount fixed in section 113-3 (c).

Representation of an indigent defendant is a traditional obligation of the bar, yet it is also one which places a burden on appointed lawyers often to the detriment of their normal practice and income. The appellants in their brief agree with the observation of this court in People v. Sims, supra, that the legislature did not intend to compensate court-appointed attorneys for their services, but urge that due to what they believe to be the protracted nature of the representation in the instant case, this decision in no way reflects upon their ability and judgment exercised in representing defendant Sanders. In acting as counsel for an indigent criminal defendant, an attorney is fulfilling the highest tradition of the bar.

For the foregoing reasons, the judgment of the Circuit Court of Cook County is hereby affirmed.

JUDGMENT AFFIRMED

BURMAN, P.J, and DIERINGER, J., concur
(ABSTRACT ONLY)

57201



PEOPLE OF THE STATE OF ILLINOIS,)
 Respondent-Appellee,)
 vs.)
 ALVIN RIGGS,)
 Petitioner-Appellant.)

) APPEAL FROM THE CIRCUIT
) COURT OF COOK COUNTY.
) Hon. L. Sheldon Brown,
) Presiding.

MR. JUSTICE McNAMARA delivered the opinion of the court:

After a bench trial in the circuit court of Cook County, Alvin Riggs was found guilty of murder and was sentenced to a term of 25 to 50 years. The judgment of conviction was affirmed by this court in People v. Riggs (1969), 115 Ill.App. 2d 409, 252 N.E.2d 725.

Petitioner then filed a pro se petition pursuant to the Illinois Post-Conviction Act alleging the violation at trial of certain of his constitutional rights. (Ill.Rev.Stat. 1969, ch.38, par.122-1, et seq.) An amended post-conviction petition was filed by appointed counsel, and the State filed a motion to dismiss the amended petition. At a hearing before the same judge who tried the case, the amended petition was dismissed without an evidentiary hearing. Petitioner appeals that order of dismissal.

Petitioner contends on appeal that his constitutional rights were violated by suggestive identification procedures; that his trial defense established a reasonable doubt of his guilt; that the doctrine of res judicata does not apply in this case; and that fundamental fairness requires a relaxation of the doctrine of waiver. Additionally, petitioner had argued that his right to counsel was violated by the pre-indictment lineup. At oral argument, however, petitioner's counsel conceded that in Kirby v. Illinois (1972), 406 U.S. 682, the Supreme Court held that there is no constitutional right to counsel at a pre-indictment lineup, and therefore has waived that issue.

On January 12, 1968, at about 11:00 p.m., Eddie Gordon was beaten unconscious by several men in an alley in the City



of Chicago. The victim died two weeks later without having gained consciousness. A police officer called to the scene testified that the victim was found about 20 to 30 feet into the alley, almost directly beneath an overhead alley light. It was snowing on the evening in question.

Two eyewitnesses testified for the State: Mrs. Veronica Strajan, who was unable to identify any of the assailants, testified that she saw three men standing over the prone victim. The men went through the victim's pockets, then started kicking the victim in the face. Mrs. Strajan screamed and ran for help. She summoned Irvin Willis, who was seated in a nearby taxi. Willis identified petitioner as the assailant who was kicking the victim. Willis testified that the area of the alley where the beating occurred was well lighted by the overhead alley light. Willis also testified that he observed the incident for about three or four minutes at a distance of about 30 feet.

Jack Adams, owner of a nearby gasoline filling station, testified that he was acquainted with both the victim and the petitioner. On the day the victim died, petitioner and Donald Brown were at the gas station. When defendant learned of the victim's death, he stated that he would be picked up, and reminded Brown that he had saved the latter at the County Jail.

At trial, petitioner relied on an alibi defense and presented evidence through himself, his mother and his wife that he was at home with a toothache from the morning of January 12 to January 13. Donald Brown testified for the defense that he was questioned by the police concerning the incident and that he told them that he had no idea who attacked the victim. However, Brown was impeached by the introduction of a prior inconsistent written statement to the effect that Brown watched petitioner kicking the victim on the evening in question.

The amended post-conviction petition was supported by affidavits, photographs and a map of the scene drawn by petitioner's counsel.

Petitioner initially contends that his constitutional rights were violated by suggestive identification procedures. Under this heading, petitioner argues that the in-court identification of him by Willis was tainted by suggestive pretrial photographic and identification procedures. Petitioner also maintains that what he characterizes as new evidence, photographs and a map of the scene hand-drawn by appellate counsel, reveals discrepancies between the actual lineal measurements of the lighting and placement of parties at the scene and that testified to by prosecution witnesses at trial, thereby rendering the State's evidence as incredible and unbelievable. In this initial contention, petitioner attacks not only the credibility of the State witnesses, but also that of the defense witness, Donald Brown.

In advancing his first contention, petitioner relies primarily upon the alleged discrepancies between the linear measurements made at the scene of the beating as supported by his post-conviction petition, and those as testified to by the witnesses at trial. The trier of fact at trial, however, heard the testimony of the witnesses and had before him photographs of the scene, reducing that matter to a question of weight and credibility. Although petitioner characterizes the State's photographs of the scene which were introduced into evidence at trial as misleading, he has not incorporated those photographs into the instant record for this court's perusal. The balance of the arguments raised under the first contention, relating to the several confrontations prior to trial, are premised on the hypothesis that Willis' initial on-the-scene observations were unbelievable and could not serve as an independent basis for his in-court identification of the petitioner. This contention



is without merit since it raises matters which either were raised or could have been raised at trial or on direct appeal from the judgment of conviction and which are therefore barred by the doctrine of res judicata. People v. Hill (1968), 39 Ill.2d 61, 233 N.E.2d 546.

Petitioner's reliance upon the case of People v. Wakat (1953), 415 Ill. 610, 114 N.E.2d 706, as standing for his position that the court in a post-conviction proceeding is not bound by the evidence adduced at trial, is not in point. In that case, there were un rebutted allegations in the post-conviction petition that perjured testimony was employed to convict the defendant. Petitioner's counsel specifically stated at the hearing on the motion to dismiss the petition that such was not the situation in the instant case.

Petitioner's next contention is that the police made an improper entry into his apartment and effected his arrest without probable cause. The evidence upon which he bases this argument, both from the trial record and from statements dehors the record, does not support this contention. Petitioner had been identified by Willis, giving the police probable cause to arrest him; a warrant was not required. (Ill.Rev.Stat. 1971, ch.38, par.107-2(c)). Further, these matters could have been raised at trial and therefore are considered waived for purposes of post-conviction relief. People v. Kamsler (1968), 40 Ill.2d 532, 240 N.E.2d 590.

Petitioner's third contention that his alibi at trial, when coupled with the alleged weakness of the State's case, established a reasonable doubt of his guilt, was expressly decided adversely to petitioner by this court on direct appeal. We do not consider the additional photographs of the map of the scene prepared by counsel to constitute new evidence. Moreover, those exhibits offered in the post-conviction petition do not create grounds for a new trial and do not reduce the evidence adduced at trial to a degree



insufficient to support a finding of guilt beyond a reasonable doubt. Such were matters for the trier of fact which may not be raised in a post-conviction proceeding. People v. Doherty (1966), 36 Ill.2d 286, 222 N.E.2d 501.

We shall consider petitioner's final contentions together. He maintains that the doctrine of res judicata is inapplicable to the circumstances of the instant case, and that fundamental fairness requires that the doctrine of waiver be relaxed.

As has been noted, the "new evidence" as to the correct location of the overhead alley light and the positioning of the parties at the scene raised, at most, a question of weight and credibility to be determined by the trier of fact, rather than a constitutional question cognizable in a post-conviction proceeding. To permit a new trial on such grounds would be to permit re-litigating of an issue already properly heard and disposed of both at trial and on direct appeal. As to the pretrial confrontations complained of in the post-conviction petition, such matters could have been raised at trial or on direct appeal. Moreover, the evidence obtained by those confrontations was unnecessary to sustain petitioner's conviction since Willis' in-court identification of petitioner clearly had an origin independent of those confrontations. Under the circumstances, no grounds have been advanced to support petitioner's claim that the doctrines of res judicata and waiver should not be applied. People v. Vail (1970), 46 Ill.2d 589, 264 N.E.2d 201; People v. Hamby (1965), 32 Ill.2d 291, 205 N.E.2d 456.

For the foregoing reasons, the order of the circuit court of Cook County, dismissing the amended post-conviction hearing, is affirmed.

Order affirmed.

DEMPSEY, P.J., and MCGLOON, J., concur.



58052



PEOPLE OF THE STATE OF ILLINOIS,	)	Appeal from the
Plaintiff-Appellee,	)	Circuit Court of
	)	Cook County
vs.)	
)	
ROBERT JOHN BUFORD (otherwise	)	Honorable
called ROBERT JOHN BURFORD),	)	Marvin E. Aspen,
Defendant-Appellant.	)	Presiding.

PER CURIAM:

Defendant, Robert John Buford, was indicted for the offense of aggravated battery, in that on November 8, 1971, he committed a battery on William F. Hamilton which caused great bodily harm, in violation of Ill. Rev. Stat. 1969, ch. 38, par. 12-4(a), and that he committed a battery with a deadly weapon in violation of Ill. Rev. Stat. 1969, ch. 38, par. 12-4(b)(1). He was also charged with attempt to kill William F. Hamilton by shooting him with a gun and stabbing him with a knife, in violation of Ill. Rev. Stat. 1969, ch. 38, par. 8-4. The jury returned a verdict of not guilty of attempt murder, guilty of aggravated battery using a deadly weapon and guilty of aggravated battery causing great bodily harm. Judgment was entered on the verdict and the defendant was sentenced to concurrent terms of not less than two nor more than seven years on each count of aggravated battery. His sole contention on appeal is that the State failed to prove beyond a reasonable doubt that he was guilty of aggravated battery and that he was not acting in self-defense.

Clarence Hill testified that on November 8, 1971, he was returning home to 143 N. Waller in Chicago when he saw two men down the street for three or four seconds. It was raining and snowing outside and as he turned to go into the building, he heard a gun fire. He went upstairs and saw a man coming toward the building, yelling for help and saying, "Help me, somebody shot me." He saw another man go across the street. The man calling for help said, "Help me someone, Bobby has shot me."

He immediately called the police and went downstairs and saw the victim, William F. Hamilton, who lived in the next building. Hamilton's throat was cut on the left-hand side of his face, there was a hole in the back of his neck, he was bleeding from the mouth and had some teeth falling out; he had no weapon. After the police came, the witness walked six buildings down the street to where the shooting occurred and found a book, some teeth and a pool of blood and a cap.

William F. Hamilton testified he knew the defendant when they worked together at Western Electric for 18 to 20 months. On November 2, 1971, the defendant took him to a meeting where he and five other men administered an oath to become a member of an organization called the United Black Oppressed Peoples Organization. On November 6, the defendant told him he should go ahead with his basic training in the organization but the witness refused to join. On November 8, 1971, about 11:30 in the morning, the defendant called and asked if he was going to work that day and the witness said he was working the 3:00 to 11:00 P.M. shift. He came home from work that day on a C.T.A. bus, purchased a bottle of wine and was carrying a novel entitled "History of African Anthology". As he walked north up Waller toward his home at 139 N. Waller, he got to an alley that intersects Waller at 117 N. Waller. He heard someone call, "Okay Darnell" (his nickname). As he turned to see who had called his name, he saw the defendant approximately 10 feet away, defendant shot him, the bullet struck his mouth, went through and came out the back of his neck. He became unconscious for about a minute; as he got up off the ground, he saw the defendant running south. He struggled to get home, saw a man in the window and called for help, was taken to Loretto Hospital and from there to Cook County Hospital, where he remained for sixteen days, had three operations and was confined to bed at home for two months. On cross-examination he testified that he never loaned any money to



the defendant, that the defendant was holding the gun at his waistline, that at most five seconds elapsed from the time he saw the gun until the defendant fired it, that the defendant didn't change position, just fired the gun. When asked if the bullet wound was on the same level with his mouth, he exhibited to the jury the point of entry and exit of the bullet. When asked if he was conscious when he was cut, he said that he didn't feel it. He was six feet tall.

The defendant testified he had known William Hamilton for about a year and a half from when they worked the same shift at Western Electric. On four occasions he borrowed a total of \$80 from Hamilton. Several times he was supposed to try to pay Hamilton back. On November 5th, at Hamilton's house, Hamilton said he wanted his money, the defendant said he would try to get it that weekend and Hamilton said, "Well, you better have it" and kept insisting that defendant have the money. Hamilton told him next time he saw him he better have the money. Defendant called Hamilton up Monday about noon and told him he wanted to come by and see him about the money. Hamilton said he had better bring it with him. That evening about 11:30 defendant was on his way over to Hamilton's house to talk to him about the money when he saw Hamilton coming up the street. Hamilton said, "Where is my money at?" and when defendant said he didn't have it, Hamilton said, "Well, I told you to have the money. I want my money." Defendant said he didn't have it with him and Hamilton said they would settle the matter right there and pulled a gun. Defendant was surprised and lunged forward at the gun, grabbed Hamilton's hand, slipped and fell, the gun went off, defendant pulled his knife out, opened it and cut Hamilton's throat and ran. He didn't know Hamilton was shot until the police told him. He denied speaking to Hamilton about any kind of meeting organization. On cross-examination, he testified he left his home that night just to explain to Hamilton that he didn't have the money that he owed him. When defendant opened his knife, Hamilton was on

the ground on his back, but he didn't know where the gun was. He did not recall seeing the gun at that point. The knife was in his right hand and he was on his knees very close to Hamilton when he cut his throat. At the time defendant began to cut Hamilton's throat, Hamilton was trying to get up.

Defendant contends that he was not the aggressor in the case at bar. The State, on the other hand, argues that the defendant waited at the alley and then shot and stabbed Hamilton, using two deadly weapons and causing great bodily harm.

The case clearly presents a question of fact. Here, the State presented evidence which, if believed, was more than sufficient to show the defendant's guilt. Hamilton was returning home from work, unarmed, carrying a bottle of wine he had just purchased and a book. Hamilton was on his own block in his own neighborhood, only a few houses away from his own home. Defendant appeared in an alley several miles distant from his own home on a cold and snowy evening late at night and shot Hamilton after calling his name. Defendant's theory, on the other hand, was that he braved the inclement weather at this hour of the night merely to tell Hamilton that he was unable to pay him \$80 he owed him, that Hamilton pulled a gun and that in trying to disarm Hamilton the gun accidentally went off and Hamilton was shot. Defendant did admit that when Hamilton lay helpless on the ground he took out his knife, opened it and deliberately cut Hamilton's throat. There was evidence from which the jury could have believed that defendant shot Hamilton, then cut his throat as he lay unconscious on the street, causing him great bodily harm. The mere fact that there is conflicting testimony or that defendant claimed

he acted in self-defense is not incompatible with the defendant's guilt. Here, the jury chose to believe the State's witnesses. The State's witnesses were not so unbelievable as to create a reasonable doubt. People v. Irvin (1968), 104 Ill.App.2d 316, 326-327, 244 N.E. 2d 351. Accordingly, the judgment of the Circuit Court of Cook County is affirmed.

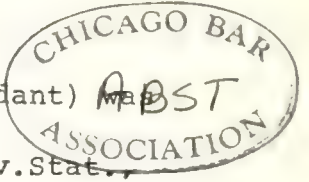
Affirmed.

THIRD DIVISION: Justice Schwartz did not participate.

58263

PEOPLE OF THE STATE OF ILLINOIS,)
)
 Plaintiff-Appellee,)
) Appeal from the Circuit
)
 v.) Court of Cook County.
)
)
 VICTOR GRAZIANA,)
 Defendant-Appellant,) Chester J. Strzalka, J.

PER CURIAM:

After a bench trial, Victor Graziana (defendant)  was

found guilty of criminal trespass to a vehicle (Ill.Rev.Stat., 1971, ch. 38, para. 21-2). He was sentenced to a term of six months to be served at the Illinois State Farm, Vandalia, Illinois.

The sole issue raised by defendant on appeal is that the People failed to prove him guilty beyond a reasonable doubt. At trial Chicago police officer Robert Hogan testified that he observed the defendant driving a truck at approximately 3:30 A.M. Defendant was stopped for a traffic violation and when he could not produce a valid Illinois driver's license, he was taken to the station to post bond. Once at the station, it was discovered that the truck had been reported stolen from Howard Steinberg. Steinberg testified that he did not give the defendant permission to enter the vehicle. This evidence was sufficient to support defendant's conviction, even though defendant presented evidence to the contrary. No error of law appears in the record and an opinion would have no precedential value. There is no reasonable doubt as to defendant's guilt. The judgment is accordingly affirmed.

This opinion is filed pursuant to Illinois Supreme Court Rule 23.

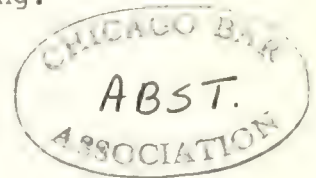
Judgment affirmed.

Third Division: Justice Schwartz did not participate.

57552

PEOPLE OF THE STATE OF ILLINOIS,	)	Appeal from the
Plaintiff-Appellee,	)	Circuit Court of
	)	Cook County,
vs.)	
	)	Honorable
PAUL E. MARSHALL,	)	James D. Crosson,
Defendant-Appellant.	)	Presiding.

PER CURIAM:



Paul E. Marshall, defendant, appeals from an order revoking his probation and sentencing him to a term of one to ten years after a hearing on a rule to show cause.

On January 10, 1969, defendant entered a plea of guilty to two indictments charging him with aggravated battery and bail jumping. He was placed on probation for a period of five years, with the condition that he serve the first nine months in Cook County Jail on each indictment, the sentences to run concurrently. On June 11, 1971, a hearing was held on a rule to show cause why defendant's probation should not be revoked because he had been convicted of robbery on September 4, 1970. After the hearing on the rule to show cause, defendant's probation was revoked and he was sentenced to a term of one to ten years on the aggravated battery indictment, the sentence to run concurrently with the previously imposed robbery sentence.

The Illinois Defender Project, appointed to represent defendant on appeal, has filed a motion in this court for leave to withdraw as appellate counsel. Pursuant to the requirements of Anders v. California, 386 U.S. 738, a brief in support of the motion has also been filed. The brief in effect states that an appeal in this case would be wholly frivolous and without merit. Defendant was mailed copies of the petition and brief on June 7, 1973, and was informed that he had until September 4, 1973, to file any additional points he might choose in support of his appeal. He has not responded.



In its petition and brief, the Illinois Defender Project alleges that the only possible issue which could be raised on appeal is whether the proceedings at the revocation of probation were proper. The brief alleges that the rule to show cause contained various factual errors in that the rule stated defendant had been convicted of robbery in Indictment 70-1450 by the Honorable Frank J. Wilson and sentenced to a term of five to ten years, when in fact defendant had been convicted of armed robbery in Indictment 70-1459 by the Honorable James Felt and sentenced to a term of five to ten years.

The procedural requirements which must be followed at a hearing on a rule to show cause were set out by this court in People v. Morales, 2 Ill.App.3d 358, 359-360, 276 N.E.2d 391, 392:

"The procedure must establish that the defendant has been given notice and a copy of the charge, that he has had an opportunity to be heard and that a conscientious judicial determination has been made in accord with the procedural methods which include the right to counsel and a reasonable time to prepare a defense. People v. Walker, 122 Ill.App.2d 461, 259 N.E.2d 304."

A review of the record in the case at bar indicates that the above procedure was followed. Defendant was given notice and a copy of the charge. Defendant appeared at the hearing represented by privately retained counsel. At the hearing, the assistant State's Attorney stated that he had a certified copy of defendant's robbery conviction and made a motion to correct the rule to show cause to insert the name of Judge Felt in place of Judge Wilson. Defense counsel did not object to the amendment and stated that he was handling defendant's direct appeal on the robbery conviction. Counsel also indicated a knowledge of the facts of the robbery conviction. The rule to show cause specifically stated the underlying facts of defendant's robbery conviction which was subsequently affirmed by this court. (People v. Marshall, 9 Ill.App.3d 1035, 293 N.E.2d 646.) At the hearing, defendant testified that his attorney was putting forth a great effort in attempting to reverse his robbery

conviction and he requested the judge to recommit him to probation. Proof of defendant's violation of probation was clearly established at the hearing. The fact that the indictment number and the charge were misstated was a technical error which did not in any way mislead the defendant and which does not affect the validity of the proceedings.

After a full examination of all of the proceedings in accordance with the dictates of Anders, we concur in the opinion of the Illinois Defender Project that the point thus raised is not arguable on its merits and that an appeal is wholly frivolous. Our examination of the record does not disclose any additional possible grounds for appeal which are also not frivolous.

The motion of the Illinois Defender Project to withdraw as appellate counsel is allowed and the judgment of the circuit court of Cook County is affirmed.

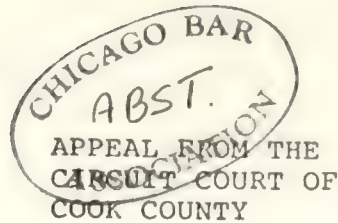
MOTION ALLOWED;
JUDGMENT AFFIRMED.

SECOND DIVISION, FIRST DISTRICT
LEIGHTON, J., did not participate.



No. 58246

PEOPLE OF THE STATE OF ILLINOIS,)
)
 Plaintiff-Appellee,)
)
 vs.)
)
 JACK FARMER,)
)
 Defendant-Appellant.)



HONORABLE
 ARTHUR L. DUNNE,
 PRESIDING.



PER CURIAM (FIFTH DIVISION, FIRST DISTRICT):

Defendant was found guilty after a jury trial of aggravated battery (Ill. Rev. Stat. 1971, ch. 38, par. 12-4(b) (6))^{*} and sentenced to not less than one nor more than two years. Defendant appeals contending he was denied effective assistance of counsel because of his lawyer's intoxication, his lawyer's failure to discover out-of-state defense witnesses and his failure to adequately cross-examine witnesses and to submit jury instructions on impeachment.

Defendant, Jack Farmer, was indicted for the offense of aggravated battery in that on November 21, 1970, he "intentionally and knowingly, without legal justification, committed a battery on Alexander Romaniuk, a peace officer, knowing Alexander Romaniuk to be a peace officer engaged in the execution of his official duties" (Ill. Rev. Stat. 1969, ch. 38, par. 12-4(b) (6)), and under the second count of the indictment, for the offense of aggravated battery, in that in committing a battery on Alexander Romaniuk he used a "deadly weapon" (Ill. Rev. Stat. 1969, ch. 38, par. 12-4(b) (1)).

After the defendant had expressed satisfaction with having Charles J. Owens, his privately retained attorney, represent him, the

MR. JUSTICE ENGLISH did not participate.

* Section 12-4 of the Criminal Code provides that a person commits aggravated battery when:

(b) A person who, in committing a battery either: ***

(6) Knows the individual harmed to be a peace officer, or a person summoned and directed by him, or a correctional officer, while such officer is engaged in the execution of any of his official duties including arrest or attempted arrest;



court questioned Owens in chambers concerning his "condition" to try the case because of an odor of alcohol on his breath and his appearance. Owens stated he was certain that he was in "condition" to try the case, that he had not been drinking that morning and had had a full breakfast. The court reiterated its statement that it wanted to make "absolutely certain" that Owens was "capable" of defending his client.

EVIDENCE

Al Romaniuk, for the State:

He is a Chicago police officer. On November 21, 1970, while off-duty and in civilian clothes, he along with his family, attended a church bazaar at St. Nicholas Church in Chicago. He saw seven or eight youths whom he did not recognize as members of the parish, and that as a result of complaints by other parishioners he spoke to these youths, including the defendant, concerning their profanity and use of "profane gestures." He noticed an alcoholic odor about them. He formed an opinion that the defendant was under the influence of an alcoholic beverage. He told them that if they did not cease their disturbing and annoying actions at the bazaar, they would be arrested. He identified himself as a police officer and showed them his star. The youths slowly left the premises but returned about an hour later, again screaming profanities and making obscene gestures. He again warned the youths to leave or be arrested. As he attempted to place one of the youths under arrest, the youth struck him in the chest. As he attempted to lead him to a telephone to get help, he felt a sharp pain on the side of his face. He felt his face, saw blood on his hand and turned in the direction of the impact and saw another youth standing there with a broken bottle, "just the stem in his hand." He later learned that this youth's name was Michael Farmer. As he went to arrest Farmer the defendant struck him full flush in the face with a bottle. He became dazed and was taken to the hospital and treated including 27 sutures in his face. Later, four or five youths were brought into the station and he charged the defendant and his brother, Michael Farmer, with hitting him. He knew

them by sight but not by name. Later on cross-examination in an effort to impeach and discredit the witness, Owens read from a transcript of testimony given at a preliminary hearing during which the witness testified that he had been struck twice "once and as he went to grab the defendant, struck again."

James Boardman, for the State:

He corroborated Romaniuk's testimony, adding that he saw Michael Farmer wielding a quart size wine bottle which was thrown in the direction of Romaniuk; that when he tried to block it, the bottle hit his shoulder and broke and a piece cut the nose of Romaniuk; and he then saw Romaniuk get hit by another bottle right square on the forehead and identified the defendant as Romaniuk's assailant. He saw the youths "split" [flee] in different directions.

Evelyn Farmer, for the defense:

She is the mother of the defendant. Jack was at his home alone with his four month old daughter from 7:00 P.M. to 12:30 A.M. while his wife visited the witness. She did not see him, but spoke with him on the telephone. She went down to the Police Station to bail out a friend of the family, Roman Duszkewycz. Her daughter-in-law Anne Farmer and her son Michael went with her and when they finished at the station, they returned to her daughter-in-law's home.

Anne Farmer, for the defense:

She is the defendant's wife. She put the baby to sleep after dinner and at 7:00 P.M. she left her husband watching the baby while she went to her mother-in-law's. She telephoned her husband between 9:30 and 10:00 to inquire about the baby. On her return home at 12:30 A.M. she found her husband sleeping.

Gerald Ociepka, for the defense:

He saw the incident in question, but did not see anyone hit with a bottle and did not see the defendant at any time. He was a "good friend" of the defendant.



After an affirmative response to the court's inquiry as to whether defendant conferred with his attorney on taking the stand to testify, defendant stated that he was satisfied with Owens' advice to take the stand, further that he understood his constitutional right not to testify and that his failure to testify could not be held against him, but he preferred to wait until the next morning before testifying. When the court inquired as to the reason for the delay, Owens stated that the only reason for the delay was they would have more witnesses the next morning.

Defendant then took the stand and testified that on the date in question, he was at home awaiting a phone call to go to work. He did not go to the bazaar and he denied striking Romaniuk. He said he talked to his wife about 10:00 P.M.

Thereafter, out of the jury's presence, Attorney Owens asked for and received a recess to the following morning in order to bring in three additional witnesses. The following morning, defendant testified in the presence of the jury that Owens had given him certain subpoenas to serve, that he went to the homes of the persons named in the subpoenas and found that they were out of state on vacation.

At this point in the trial, the assistant State's attorney asked for a side-bar conference and discussed a man making hand gestures toward defense counsel's table and outside the presence of the jury. The court admonished James Farmer, the defendant's father, who allegedly had been making the gestures in question, to "remain silent" and behave himself, indicating that if he wished to confer with his son or his son's attorney, he might do so during the recess. Whereupon the father stated: "May I direct attention to the fact that this is my - not my son's attorney. I did not employ him. My wife did not. My son did not." Nothing more was said and the court directed defendant's father to be seated.

Thereafter, in chambers, there was a discussion about jury instructions in which Owens stated that his instructions were being typed at that moment. The judge indicated that if defense counsel would

indicate the additional IPI instructions he wished to be given, he would have the State's attorney prepare them and bring them up. The court then gave the defendant permission to leave the court to go to his attorney's office to pick up the typed instructions. Owens stated that he had his instructions. During the discussion of the instructions, the defendant took exception to certain ones and did not object to certain others. After argument by counsel and instruction, the jury returned a verdict of guilty on Count I and no verdict on Count II.

On Monday, July 24, 1972, defendant made an oral motion for judgment notwithstanding the verdict, which was denied along with a motion in arrest of judgment and a motion for a new trial. At the hearing in aggravation and mitigation, the trial court stated to Mrs. Farmer that he agreed with the verdict of the jury and that it was a proper verdict. The judge also referred to a letter which he had received from Mr. Farmer, defendant's father, which contained some complaint of brutality towards Michael Farmer and the judge indicated that he had contacted the Chicago Police Department, Internal Investigation Division, concerning that matter. The court went on as follows:

THE COURT: Now, with respect to another matter raised in the letter received from Mr. Farmer, with respect to the condition of Mr. Owens or his ability to try the case by reason of a drinking problem. I asked your son at the outset did he wish Mr. Owens to represent him. Mr. Owens' appearance had been on file since March 9, 1972, together with a man named Jennings.

I interrogated Mr. Owens to see if he could competently try the case. He indicated to me he was and would be. Furthermore, I have observed Mr. Owens while he conducted his defense of the defendant in this cause, and I believe that he conducted an adequate defense of your son.

OPINION

Defendant now contends on appeal that he was denied the effective assistance of counsel guaranteed by the Sixth Amendment since his "lawyer was drunk," citing as evidence certain remarks by the court and Owens when they were discussing the jury instructions and Owens' cross-examination of a witness. However, the record makes clear that



Owens was not drunk. The judge, in an effort to expedite the instructions, strongly encouraged the defendant to write down the IPI instructions he wished the court to give so the court would not have to wait for defendant's instructions to be typed. The record indicates that the instructions were, in fact, typed and that the judge allowed defendant personally to leave the courthouse and that he did pick them up at his attorney's office. In any event, the judge's comments in the record indicate that he was aware of the possibility that Owens might not be in "condition" to try the case and that this might have some effect on his conduct of the defense. But the record, shows that defense counsel was alert, that he was effective in cross-examining witnesses, and that he made frequent and timely objections, all of which supports the trial judge's comment to defendant's mother after the trial that he was satisfied defense counsel was able to competently try the case and in fact that the defense was adequate. While the defense attorney gave the trial court some cause for concern because of his physical appearance, the record does not show that his mental ability was impaired or that the trial was conducted improperly. While there was some delay in getting the instructions typed and brought to court, the record shows that the defense counsel and the State went over the instructions and that the rights of the defendant were protected. It should also be noted that, although an attempt to discredit defense counsel was made in open court at the end of the trial, defendant, himself, did not participate in this attempt. It was his father's act alone.

Defendant cites four specific instances he now asserts deprived him of the effective assistance of counsel. First, he complains of his counsel's cross-examination of the witness Boardman, specifically that part of the examination which dealt with the nature of the contents of the bottle. Among the explanations for this line of questioning are the possibility that if the wine were red, this would account for Boardman's testimony that Romaniuk's face was covered with blood. On appeal defendant's statement that the predominant theme of the cross-examination of Boardman was "counsel's interest in what type of

intoxicating beverage was in the bottle" and was "totally irrelevant except to the lawyer's personal interest in intoxicating beverages" is pure speculation on his part, unsupported by anything in the record.

Defendant contends that his attorney neglected to submit an IPI instruction on impeachment in regard to Officer Romaniuk's testimony. Romaniuk clearly testified that he was struck twice-once as he attempted to arrest one of the youths and again by the defendant. There were no inconsistent statements made which could support such an instruction.

Next, defendant has not shown that any prejudice resulted from the unavailability of the three witnesses. Their failure to appear is not evidence of counsel's incompetence. Counsel had arranged for subpoenas to be served upon them and the defendant testified he tried to serve them. How counsel could have done more is unclear.

Finally, defendant complains that inadmissible hearsay testimony was admitted through incompetent cross-examination. In this instance, defendant's counsel was cross-examining Officer Romaniuk, trying to show that he did not, of his own knowledge, know who his assailant was. Further, that the officer's identification of the defendant was not made of his own knowledge, but an identification based upon hearsay, i.e., what other boys told him. In other words, the defense strategy here, which was certainly an appropriate one, was to show that the defendant's identification was faulty because it was based upon hearsay. The objective of the testimony about which defendant now complains was to show that the officer couldn't ascertain the defendant's name without talking to other persons. This was entirely proper even though defendant had been identified by Boardman and by Romaniuk who testified he knew defendant by sight but not by name.

No trial is ever perfect. While there might have been imperfections in this trial, we find that the matters complained of did not amount to a deprivation of effective assistance of counsel. The trial judge properly concluded that the defendant was adequately represented. People v. Newell, 48 Ill.2d 382, 387, 268 N.E.2d 17, 19-20; People v. Steel, 52 Ill.2d 442, 452-453, 288 N.E.2d 355, 361-362. Accordingly, the judgment is affirmed.

Affirmed.



58898

PEOPLE OF THE STATE OF ILLINOIS,	)	APPEAL FROM
Plaintiff-Appellee,)	
	)	CIRCUIT COURT,
vs.)	
	)	COOK COUNTY.
ROOSEVELT WILSON,)	
Defendant-Appellant.	)	HON. MAURICE D. POMPEY,
		Presiding.



*PER CURIAM (FIRST DIVISION, FIRST DISTRICT):

Roosevelt Wilson, hereafter called defendant, was charged by complaint with the offenses of disorderly conduct, obstructing a police officer, and resisting arrest. After a bench trial, defendant was found not guilty of disorderly conduct but guilty of obstructing a police officer and of resisting arrest. He was sentenced to a term of sixty days in the House of Correction on each charge, the sentences to run concurrently. Defendant was tried with Johnny Washington, George Grundy, Lawrence Davis, George Hawkins and Lutes Edwards, each of whom was charged with disorderly conduct and found not guilty. On appeal, defendant argues (1) that on the offense of obstructing a police officer the evidence was insufficient to establish his guilt beyond a reasonable doubt and the complaint was insufficient to state an offense; (2) that he was denied the opportunity to call co-defendants as witnesses in his defense; and (3) that his sentence is excessive and should be reduced.

Prior to trial, the defendant was advised by the trial judge that he had a right to be represented by an attorney of his own choosing and if he did not have the funds to hire an attorney and wished to be represented by an attorney, the court would appoint the public defender. Defendant specifically stated that he did not wish the public defender but wished to represent himself. The trial judge informed the defendant as to the nature

of the charges against him and the possible penalties and again asked if the defendant wished the public defender to be appointed to represent him. Defendant again replied that he did not and that he wished to represent himself.

The following evidence was adduced at trial: Herbert Bailey, a Chicago police officer, testified that on May 1, 1972, at approximately 9:30 P.M., he observed three men in an alley drinking. He asked the men to leave the area. He returned to the area about one-half hour later and observed the same three men at the corner of 56th and Racine, Chicago, Illinois, in the company of approximately seven other people. The men were blocking the sidewalk so no one could pass. Officer Bailey approached the men and identified himself as a police officer. He asked the men to leave the corner. When the men refused, he placed them under arrest. At that time the defendant came out of a store and upon observing the people up against the wall said, "What is this." Officer Bailey replied that he was a police officer conducting an investigation and requested the defendant to move on. Defendant replied, "I don't have to do a damn thing." Defendant then said to the offenders, "Man, take your hands off the wall. Turn around and kick these pigs in the ass. You don't have to take this shit." Officer Bailey again requested the defendant to leave the area and the defendant replied, "Man kiss my ass. I don't have to go anywhere." Defendant was again requested to leave and when he refused, Officer Bailey informed him that he was under arrest for interfering with a police officer in the performance of his duty. Officer Bailey then grabbed defendant by the hand and defendant pulled his hand away and hit Officer Bailey in the neck. A scuffle ensued, after which defendant was subdued.

After Officer Bailey finished his direct testimony, the trial



court advised the defendant that he had a right to cross-examine and ask any questions of the officer that he wished. Defendant attempted to state what had happened and the trial judge informed him that he would be given an opportunity to testify but that this was not the time. Defendant was advised that he was to ask specific questions of Officer Bailey if he wished. After Officer Bailey concluded his testimony, the State rested its case in chief.

Defendant was then advised that he had the right to testify in his own behalf if he wished and he had the right not to testify if he so wished. Defendant stated that he wished to testify. Defendant testified that he came out of the store with a bag of groceries, accompanied by his son. Officer Bailey grabbed his hand and another officer got between defendant and his son. Defendant denied hitting Officer Bailey and stated he had his hands full with the bag of groceries. Defendant stated that as Officer Bailey was trying to pull him he was only trying to get to his son. Defendant then asked if anyone saw him strike Officer Bailey. The five co-defendants all replied no. The trial court informed the defendant that these people were not his witnesses yet and at the proper time he would be allowed to call witnesses if he wished.

The trial judge then inquired of the defendant if he wished to call any witnesses in his behalf. Defendant replied only the people who were present in court. The trial judge stated that each defendant would be given the opportunity to testify.

Johnny Washington, George Grundy, Lawrence Davis, George Hawkins and Lutes Edwards each testified that they were merely standing outside the store at 56th and Racine, Chicago, Illinois, when the police came up and placed them under arrest. Neither the assistant State's attorney nor the defendant asked any

questions of the witnesses.

Defendant then recalled Officer Bailey to the stand. Officer Bailey testified that upon his arrival at the scene there were 15 to 20 people present. When he left the scene there were approximately 100 to 150 people present. Defendant stated that he had no further questions.

Defendant's first argument is that on the charge of obstructing a police officer the evidence was insufficient to establish his guilt beyond a reasonable doubt and the complaint was insufficient to state a crime. The basis of defendant's argument is that the complaint alleged and the evidence at trial established that his actions constituted mere argument with the officer and that in the absence of "some physical act" which interfered with the police officer in the official performance of his duty there cannot be a charge or conviction for obstructing a police officer. To support his position, defendant relies upon People v. Raby, 40 Ill.2d 392, 240 N.E.2d 595.

In People v. Gibbs, 115 Ill.App.2d 113, 253 N.E.2d 117, this court considered a similar argument. There the defendant was convicted of obstructing a police officer. The evidence established that as Chicago police officers were arresting several offenders the defendant came upon the scene and demanded to know what was happening. Defendant was informed that it was police business and was asked not to interfere. Defendant replied that the police had no right to search the offenders and that they were violating the offenders' constitutional rights. Defendant then told the offenders that they did not have to submit to a search and told them to go into a nearby office on private property. Defendant then entered the nearby office and the offenders followed. Defendant then told the police that they had no right to search the offenders on

private property and the defendant was again warned that he was interfering with police business. Defendant was placed under arrest. On appeal, the defendant argued that the evidence was insufficient to establish obstruction of a police officer. This court noted that the defendant's conduct fell somewhere between mere argument with the officers and "some physical act" and was not contemplated by the court in People v. Raby, 40 Ill.2d 392, 240 N.E.2d 595. In holding the evidence sufficient to support defendant's conviction for obstructing a police officer, this court said:

"Under these circumstances, it is clear that defendant interfered with and obstructed the officers in the performance of their duties as completely and as effectively as if he physically touched or otherwise physically interfered with the officers." (People v. Gibbs, 115 Ill.App.2d 113, 119, 253 N.E.2d 117, 120.)

In People v. Jackson, 131 Ill.App.2d 57, 266 N.E.2d 475, the defendant was convicted of obstructing a police officer. The evidence established that while the police officer was placing another offender under arrest the defendant came over and demanded the release of the offender. The police officer replied that the matter did not concern the defendant and asked him to leave. The defendant refused. The officer again asked the defendant to leave and the defendant again refused. The officer then placed defendant under arrest and when the officer attempted to search him, defendant pushed the officer back, saying, "No one is searching me." On appeal, defendant argued that the evidence was insufficient to establish that he had obstructed an authorized act of a police officer. This court rejected defendant's contention and affirmed the conviction, holding that the evidence was sufficient to establish the defendant's guilt on the offense of obstructing a police officer beyond a reasonable doubt.

In the case at bar, it is clear that the defendant did more

than merely argue with the police officers. The evidence established that as Officer Bailey was placing several offenders under arrest, the defendant came upon the scene and asked what was happening. Officer Bailey informed the defendant that he was a police officer conducting an investigation and requested him to move along. Defendant refused and incited the offenders to resist the police. Defendant was again asked to leave and again he refused. Defendant was then informed that he was under arrest. When Officer Bailey attempted to take hold of the defendant, he pulled away and hit Officer Bailey in the neck. A scuffle ensued, after which the defendant was subdued. Under these circumstances, defendant's actions interfered with and obstructed the police officers in the performance of their duties. The evidence was sufficient to establish the defendant's guilt beyond a reasonable doubt.

Defendant's second argument is that he was denied an opportunity to call his co-defendants as witnesses in his behalf. After the conclusion of the trial, defendant retained counsel and filed a detailed two-page written motion for a new trial. In that motion defendant did not argue that he was denied an opportunity to call his co-defendants as witnesses in his behalf. Having failed to make that argument in his written motion for a new trial, the argument is considered waived and cannot now be raised by defendant on appeal. People v. Pickett, 54 Ill.2d 280, 296 N.E.2d 856.

Even if defendant's argument were to be considered, it is not supported by the record. After being specifically informed of his right to be represented by counsel free of charge, and as to the nature of the charges and the possible penalties, the defendant insisted upon representing himself. When the defendant exercised his right to represent himself, he assumed the responsibility for

that decision. People v. Richardson, 17 Ill.2d 253, 161 N.E.2d 268. The trial judge specifically admonished the defendant that he had a right to cross-examine witnesses and to call any witness he desired in his own defense. All of the co-defendants testified at trial. Defendant was well aware of his right to question any witness, as evidenced by the fact that at one point he recalled Officer Bailey for further questioning after the co-defendants had each testified. The trial judge at all times was careful to inform defendant of his rights and to protect those rights. The evidence does not establish that defendant was denied the opportunity to call his co-defendants as witnesses or to question them after they had testified.

Defendant's final argument is that his sentence is excessive and should be reduced to a period of probation. The power to reduce sentences should be exercised with care and only where it is manifest in the record that the sentence is excessive. People v. Bennett, 9 Ill.App.3d 1021, 293 N.E.2d 687. In the case at bar, the defendant was convicted of obstructing a police officer in violation of section 31-1 of the Criminal Code (Ill.Rev.Stat. 1971, ch. 38, par. 31-1), the penalty for which is a fine not to exceed \$500 or imprisonment in a penal institution other than the penitentiary not to exceed one year, or both. The sentence imposed in this case is within the statutory limits and a review of the facts of the case demonstrates that the sentence imposed by the trial judge is not excessive.

For the foregoing reasons the judgment of the Circuit Court of Cook County is affirmed.

JUDGMENT AFFIRMED.

* Egan, J., did not participate.

58984

PEOPLE OF THE STATE OF ILLINOIS,) APPEAL FROM
 Plaintiff-Appellee,)
 vs.) CIRCUIT COURT,
) COOK COUNTY.
 LEON SMITH,)
 Defendant-Appellant.) HON. KENNETH R. WEAST
 Presiding.



*PER CURIAM (FIRST DIVISION, FIRST DISTRICT):

Leon Smith, defendant, was found guilty after a bench trial on December 15, 1971, of the offense of unlawful sale of a narcotic drug. He was sentenced to a term of from one to three years. Defendant appealed and on June 25, 1973, this court affirmed the judgment of conviction (People v. Smith, 12 Ill.App.3d 488, 299 N.E.2d 506). On January 10, 1972, defendant filed a pro se petition pursuant to the Post-Conviction Hearing Act (Ill.Rev.Stat. 1971, ch. 38, par. 122-1 et seq). The petition alleged (1) that at his trial the State did not introduce any competent evidence that the drug in question was a narcotic drug; (2) that he was convicted solely on the uncorroborated testimony of a police informer who was an ex-convict and a drug addict; (3) that he was not proved guilty beyond a reasonable doubt; and (4) that his trial and appellate counsel were incompetent in that they failed to raise the above issues at trial and on appeal. On January 24, 1973, defendant's pro se post-conviction petition was dismissed without an evidentiary hearing. Defendant appeals that dismissal.

The public defender of Cook County, who was appointed to represent defendant on appeal, has filed a motion for leave to withdraw. The motion, supported by a brief pursuant to Anders v. California, 386 U.S. 738, states that the only available issue on appeal would be whether petitioner was entitled to an evidentiary hearing on the allegations in his post-conviction petition. The brief concludes that an appeal on this issue would be legally

frivolous and without merit. Defendant was mailed copies of the motion and brief and was advised that he had until September 20, 1973, to file any additional points he might choose in support of his appeal. He has not responded.

Defendant's first three allegations in his pro se post-conviction petition, that the State did not establish the substance in question was heroin, that he was convicted solely on the uncorroborated testimony of a police informer who was also an ex-convict and a drug addict, and that he was not proved guilty beyond a reasonable doubt, all relate to the sufficiency of evidence. Questions as to the sufficiency of evidence do not present a constitutional issue and cannot be properly considered in post-conviction proceedings. (People v. Dunn, 52 Ill.2d 400, 288 N.E. 2d 463.) Since defendant's first three allegations all relate to the sufficiency of evidence, no evidentiary hearing was required on these allegations.

We have also noted that the first three allegations in defendant's pro se post-conviction petition were expressly argued in his direct appeal. Since these allegations were raised in defendant's direct appeal and that appeal has become final, consideration of these issues is now barred by the doctrine of res judicata. People v. Jenkins, 12 Ill.App. 3d 833, 299 N.E.2d 155.

Defendant's fourth allegation in his pro se post-conviction petition is that his trial and appellate attorneys were incompetent in that they failed to raise the first three allegations of his post-conviction petition at trial and on appeal. As previously pointed out, the first three allegations of defendant's pro se post-conviction petition were expressly raised in his direct appeal. Since each of these issues was raised in defendant's direct appeal, no evidentiary hearing was required on the allegation that his attorney was incompetent for failure to raise those issues.

We have examined the record and concur in the opinion of the public defender that the argument thus raised is not arguable on its merits and is wholly frivolous. Our inspection of the record does not disclose any additional possible grounds for an appeal which are not also frivolous.

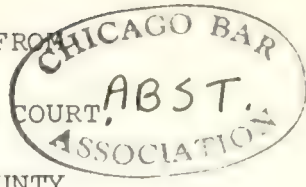
For the foregoing reasons, the motion of the public defender of Cook County to withdraw as counsel on appeal is allowed and the judgment of the Circuit Court of Cook County, dismissing the petition, is affirmed.

MOTION ALLOWED;
JUDGMENT AFFIRMED.

Goldberg, J., did not participate.

58197

PEOPLE OF THE STATE OF	)	APPEAL FROM
ILLINOIS,)	
Plaintiff-Appellee,	)	CIRCUIT COURT,
	)	COOK COUNTY.
vs.)	
)	
THOMAS SMITH,	)	HON. THOMAS P. CAWLEY,
Defendant-Appellant.	)	Presiding.



* PER CURIAM (FIRST DIVISION, FIRST DISTRICT):

Thomas Smith, defendant was convicted after a bench trial, of the offenses of theft (Ill. Rev. Stat. 1971, ch. 38, par. 16-1(a)(1)) and battery (Ill. Rev. Stat. 1971, ch. 38, par. 12-3). He was sentenced to a term of one year on the theft charge and six months on the battery charge, both sentences to run concurrently. On appeal defendant argues that the trial court erred in denying his request for a continuance and that his conviction and sentence for both theft and battery are improper since they both arose out of the same conduct.

Defendant was originally charged by complaint with the crime of robbery. (Ill. Rev. Stat. 1971, ch. 38, par. 18-1.) On September 18, 1972 the case was called and defendant requested a continuance. Previously the case had been continued three times, each time on motion of the State. Defendant's request was denied and the Public Defender was appointed to represent him. The case was passed while the Public Defender conferred with defendant. When the case was recalled the Assistant State's Attorney asked leave to file two new complaints against defendant charging the misdemeanors of theft and battery. The trial court granted leave to file the complaints over the objections of defense counsel. The robbery charge was then dismissed. Defendant requested a continuance based upon the fact that the State had filed new charges and the defendant had no time to prepare for trial. The Assistant

State's Attorney stated that he would have no objection to defendant's motion for a continuance because he did not want the defendant prejudiced in any way. The Assistant State's Attorney also informed the complaining witness that he would have to appear in court on one more occasion. The trial judge denied defendant's request for a continuance and proceeded with the trial.

Defendant's first argument is that the trial court erred in denying his motion for a continuance. Motions for continuance are addressed to the discretion of the trial court. People v. Clark, 9 Ill.2d 46, 137 N.E.2d 54. A reviewing court will not interfere with the trial court's denial of a defendant's request for a continuance unless the trial court has abused its discretion. People v. Summers, ____ Ill.App.3d ____, ____ N.E.2d ____ (No. 55689, First District, June 14, 1973). A defendant is entitled to a continuance for the adequate preparation of his defense. People v. Kenzik, 9 Ill.2d 204, 137 N.E.2d 270.

In the case at bar the record shows that defendant was charged with the felony of robbery until September 12, 1972. Prior to that date the cause had been continued on three occasions upon motion of the State. No previous continuances had been requested by defendant. On September 12, 1972 the Public Defender was appointed to represent the defendant and talked to him for the first time on that date. The State then filed new misdemeanor charges against the defendant and dismissed the felony charge. There is no showing that defendant or his newly appointed counsel had any notice that the new charges would be filed. Defendant then requested a continuance in order to prepare for a trial on the new charges. The Assistant State's Attorney recognizing that he had just filed two new charges stated that he would have no objection to the continuance because he did not want to prejudice the

defendant. Under these circumstances we conclude that the trial court should have allowed defendant an opportunity to prepare for trial and the failure to do so constituted an abuse of discretion.

Having reached this conclusion it is unnecessary for us to consider the other contention.

For the foregoing reasons, the judgment is reversed and the cause is remanded for a new trial.

JUDGMENT REVERSED AND
CAUSE REMANDED.

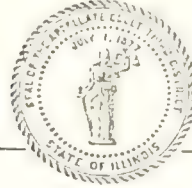
*EGAN, J., did not participate.

14 I.A.³ 1088

72-192

PEOPLE VS JACK AUSTIN REYNOLDS

ABST.
STATE OF ILLINOIS



APPELLATE COURT THIRD DISTRICT
OTTAWA

At a term of the Appellate Court, begun and held at Ottawa,
on the 1st Day of January in the Year of our Lord one thousand
nine hundred and seventy-three, within and for the Third District
of Illinois:

Present— PC

HONORABLE JAY J. ALLOY, Presiding Justice

HONORABLE ALBERT SCOTT, Justice

HONORABLE ALLAN L. STOUDER, Justice

HONORABLE WALTER DIXON, Justice

JOHN E. HALL, Clerk

JAMES A. CALLAHAN, Sheriff

BE IT REMEMBERED, that afterwards on
OCTOBER 26, 1973 the Opinion of the
Court was filed in the Clerk's Office of said Court, in the words
and figures following, viz:

In The
APPELLATE COURT OF ILLINOIS
Third District
A. D. 1973.

PEOPLE OF THE STATE OF ILLINOIS,	)	Appeal from the
	)	Circuit Court of
Plaintiff-Appellee,	)	Kankakee County.
)	
vs.)	
)	
JACK AUSTIN REYNOLDS,)	
)	
Defendant-Appellant.)	

PER CURIAM

Abstract

Defendant Jack Austin Reynolds pleaded guilty to murder in the Circuit Court of Kankakee County on July 13, 1970. He was sentenced to a term of not less than thirty (30) nor more than fifty (50) years. He had entered a plea of guilty to the charge.

On June 1, 1971, defendant filed a Petition for Post-Conviction Relief under the Illinois Revised Statutes, ch. 38 §122 et seq. He alleged in such petition that (1) he was denied the right to see his arrest warrant after being arrested for the murder charge; (2) he was coerced into pleading guilty to a murder charge; and (3) he was not allowed to have his clothes while at Joliet and was made to walk barefooted to a police car parked in front of the Joliet prison.

None of the points raised are supported by sufficient evidence from either the record or the affidavit to show any substantial denial of constitutional rights. The burden falls upon petitioner in a post-conviction proceeding (People v. Stovall, 47 Ill. 2d 42, 264 N.E.2d 174). The post-conviction hearing dealt

exclusively with the claim of petitioner that he was coerced into pleading guilty as a result of being offered a negotiated plea which the trial court did not ultimately concur in. It is apparent from defendant's testimony at the hearing that the Judge advised him that he was not bound by the agreement and that in fact the Judge did not participate in the actual bargaining between defense counsel and the prosecutor. During the hearing relating to the acceptance of the plea of guilty, the Judge specifically informed Reynolds that he was not bound by the terms of the plea agreement. The court then refused to impose the sentence recommended by the State of fourteen (14) to twenty (20) years and ordered that a sentence of not less than thirty (30) nor more than fifty (50) years be imposed.

Since the trial court did not participate in the plea negotiations or lead Reynolds to believe he would receive the negotiated sentence in return for his plea, the allegations with respect to the court's actions are without substance.

It is apparent from the record that defendant's guilty plea was taken in accordance with the provisions of Rule 401 as it then existed (1969 Ill. Rev. Stat., ch. 110A §401). There is no evidence that anything occurred in the proceedings which could constitute a substantial denial of constitutional rights so as to justify any relief under the Post-conviction Act. People v. Slaughter, 39 Ill. 2d 278, 235 N.E. 2d 566 and the specific Supreme Court Rules, notably Rule 651 (Ill. Rev. Stat., Ch. 110A, Rule 651), set out the standards relating to post-conviction proceedings. The standards have been met in this case and there is nothing in the defendant's testimony or in the record to indicate that it was necessary for counsel to amend the pro se petition in order to make it more appropriate to include any other allegations of constitutional deprivation.



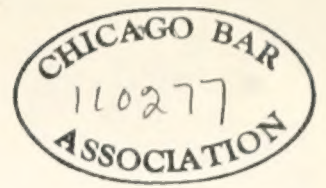
The contention that the sentence was excessive cannot be raised as a post-conviction issue in a post-conviction proceeding. People v. Murray, 5 Ill. App. 3d 64, 283 N.E. 2d 98. It is asserted, that defendant has a direct appeal pending challenging the excessiveness of the sentence. Defense counsel have indicated that defendant is in agreement with the contention of defense counsel in a motion for leave to withdraw filed in this court in compliance with the case of Anders v. California, 386 U.S. 738, that the post-conviction appeal would be wholly frivolous and could not possibly be successful. We agree with counsel that this is so and that such conviction should be affirmed.

The judgment of the Circuit Court of Kankakee County denying defendant's post-conviction proceeding will, therefore, be affirmed and counsel for the defendant in this proceeding is permitted to withdraw pursuant to the motion filed herein.

Judgment affirmed and
Leave to Withdraw approved.



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